FILED
JUN 15 1982
ALEXANDER L. STEVAS,
CLERK

81-2296

No. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL FOOTBALL LEAGUE, *et al.*,

Petitioners,

—against—

NORTH AMERICAN SOCCER LEAGUE, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM E. WILLIS
Attorney for Petitioners
125 Broad Street
New York, New York 10004
(212) 558-4000

JAMES H. CARTER
HOWARD D. BURNETT
JAMES W. DABNEY
SULLIVAN & CROMWELL
Of Counsel

Questions Presented for Review

1. Does an internal management decision of the governing body of the National Football League (the "NFL") which defines the qualifications for controlling ownership in an NFL team (and for consequent membership in the NFL's governing body) to exclude from membership persons who act simultaneously as owners and managers of a competing professional sports league constitute an illegal contract, combination or conspiracy in restraint of trade under Section 1 of the Sherman Act?

2. May an antitrust product market or submarket—described by the court below as consisting of "sports ownership capital"—be defined (i) without regard for product substitutes and (ii) instead according to "distinct characteristics" of individual *sellers*, without regard for whether the *product* whose trade allegedly is restrained has any distinct characteristics?

3. May market foreclosure, as a form of antitrust injury, be held unlawful without regard for either the share of the market allegedly foreclosed or any actual impact on competitive conditions?

4. Under the Rule of Reason, do antitrust defendants bear the burden of proving the *absence* of "less restrictive alternatives" to an alleged restraint of trade?

Parties Below

The parties to the proceedings below as of the time of trial are set forth in the margin.* Certain plaintiffs-respondents have since ceased operations.

---

* **Plaintiffs-Respondents:** North American Soccer League; Orange County Pro Soccer (California Surf); Chicago World Soccer Inc. (Chicago Sting); Atlanta Professional Soccer, Ltd. (Atlanta Chiefs); Michigan Soccer, Limited (Detroit Express); Houston Professional Soccer Club, Inc. (Houston Hurricane); Aztecs Professional Soccer Club (Los Angeles Aztecs); Memphis Rogues, Ltd. (Memphis Rogues); Minnesota Soccer, Inc. (Minnesota Kicks); Lipton Professional Soccer, Inc. (New England Tea Men); Cosmos Soccer Club, Inc. (New York Cosmos); Edmonton NASL Soccer Enterprises, Ltd. (Edmonton Drillers); Philadelphia Soccer Associates (Philadelphia Fury); Louisiana-Pacific Corporation (Portland Timbers); Blue & Gold Limited (Rochester Lancers); San Diego Professional Soccer Club, Inc. (San Diego Sockers); San Jose Earthquakes Limited (San Jose Earthquakes); Tampa Bay Soccer Club, Inc. (Tampa Bay Rowdies); Prosoccer Limited (Toronto Blizzard); Tulsa Roughnecks, Ltd. (Tulsa Roughnecks); Vancouver Professional Soccer Club, Ltd. (Vancouver Whitecaps); and MSG Soccer, Inc. (Washington Diplomats).

Defendants-Petitioners: National Football League; The Five Smiths, Inc. (Atlanta Falcons); Baltimore Football Club, Inc. (Baltimore Colts); Buffalo Bills, Inc. (Buffalo Bills); Cincinnati Bengals, Inc. (Cincinnati Bengals); Cleveland Browns, Inc. (Cleveland Browns); Dallas Cowboys Football Club, Inc. (Dallas Cowboys); Rocky Mountain Empire Sports, Inc. (succeeded since trial by E.F.K. Sports, Ltd.) (Denver Broncos); The Detroit Lions, Inc. (Detroit Lions); Green Bay Packers, Inc. (Green Bay Packers); Los Angeles Rams Football Company (Los Angeles Rams); Minnesota Vikings Football Club, Inc. (Minnesota Vikings); New England Patriots Football Club, Inc. (New England Patriots); New Orleans Saints Louisiana Partnership (New Orleans Saints); New York Football Club, Inc. (New York Giants); New York Jets Football Club, Inc. (New York Jets); Oakland Raiders, Ltd. (Oakland Raiders); The Philadelphia Eagles (Philadelphia Eagles); Pittsburgh Steelers Sports, Inc. (Pittsburgh Steelers); St. Louis Cardinals Football Co. (St. Louis Cardinals); Chargers Football Company (San Diego Chargers); San Francisco Forty-Niners, Ltd. (San Francisco 49ers); Tampa Bay Area NFL Football, Inc. (Tampa Bay Buccaneers); and Pro-Football, Inc. (Washington Redskins).

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Parties Below	ii
Table of Authorities	iv
Opinions Below	1
Basis of Jurisdiction	1
Statute Involved	2
Statement of the Case	3
ARGUMENT	6
I. The Court of Appeals Evaluated the Internal Decisions of a Professional Sports League According to Entirely Inappropriate Legal Standards	7
II. The Court of Appeals Ignored This Court's Decisions Governing Sherman Act Market Definition and Measurement	18
A. Sherman Act Product Markets Must Be Defined According to Product Characteristics, Not Seller Characteristics	18
B. Market Foreclosure, as a Form of Antitrust Injury, Cannot Be Found Unlawful Without Regard to Market Size or Market Impact	21

PAGE

III. The Rule of Reason Cannot Require Antitrust Defendants to Disprove the Possibility of So-Called Less Restrictive Alternatives .. 23

Conclusion 26

APPENDIX

Court of Appeals Opinion 1a
District Court Opinion 29a
Order Denying Petition for Rehearing 103a

TABLE OF AUTHORITIES

Cases

American Motor Inns, Inc. v. *Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975) 19, 24

Bowman v. *National Football League*, 402 F. Supp. 754 (D. Minn. 1975) 11

Broadcast Music, Inc. v. *CBS, Inc.*, 441 U.S. 1 (1979) 11

Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962) 20, 21, 22

Denver Rockets v. *All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971) 12

Federal Baseball Club of Baltimore, Inc. v. *National League of Professional Baseball Clubs*, 259 U.S. 200 (1922) 8

Flood v. *Kuhn*, 316 F. Supp. 271 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972) 8, 12

Fruehauf Corp. v. *FTC*, 603 F.2d 345 (2d Cir. 1979) 21

PAGE

Hawkins v. *National Basketball Association*, 288 F. Supp. 614 (W.D. Pa. 1968) 12
Hughes v. *Oklahoma*, 441 U.S. 322 (1979) 24
Hunt v. *Washington State Apple Advertising Commission*, 432 U.S. 333 (1977) 24
Klor's, Inc. v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) 25
Knutson v. *Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977) .. 15
Levin v. *National Basketball Association*, 385 F. Supp. 149 (S.D.N.Y. 1974) 12
Los Angeles Memorial Coliseum Commission v. *National Football League*, 519 F. Supp. 581 (C.D. Cal. 1981) 13
Mackey v. *National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977) 12
National Society of Professional Engineers v. *United States*, 435 U.S. 679 (1978) 16, 22, 23, 25
North American Soccer League v. *National Football League*, 505 F. Supp. 659 (S.D.N.Y. 1980), *rev'd in part*, 670 F.2d 1249 (2d Cir. 1982) 12
Ogilvie v. *Fotomat Corp.*, 641 F.2d 581 (8th Cir. 1981) 15
Photovest Corp. v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980) 15
Radovich v. *National Football League*, 352 U.S. 445 (1957) 8
San Francisco Seals, Ltd. v. *National Hockey League*, 379 F. Supp. 966 (C.D. Cal. 1974) ... 12

PAGE

Schine Chain Theatres, Inc. v. *United States*, 334 U.S. 110 (1948) 19
Smith v. *Pro-Football, Inc.*, 420 F. Supp. 738 (D.D.C. 1976), *rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978) 12
Smith v. *Pro-Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978) 9, 13
Standard Oil Co. v. *United States*, 337 U.S. 293 (1949) 21
Standard Oil Co. v. *United States*, 221 U.S. 1 (1911) 25
Susser v. *Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), *cert. dismissed*, 381 U.S. 125 (1965) .. 21

Tampa Electric Co. v. *Nashville Coal Co.*, 365 U.S. 320 (1961) 18, 19, 20, 21, 22, 23, 24
Timken Roller Bearing Co. v. *United States*, 341 U.S. 593 (1951) 16
Toolson v. *New York Yankees, Inc.*, 346 U.S. 356 (1953) 8

United States v. *American Linseed Oil Co.*, 262 U.S. 371 (1923) 25
United States v. *Connecticut National Bank*, 418 U.S. 656 (1974) 20
United States v. *E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957) 21
United States v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956) 21
United States v. *International Boxing Club of New York, Inc.*, 348 U.S. 236 (1955) 8
United States v. *Morgan*, 118 F. Supp. 621 (S.D. N.Y. 1953) 11
United States v. *National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953) 10, 11

PAGE

United States Steel Corp. v. *Fortner Enterprises, Inc.*, 429 U.S. 610 (1977) 19

Statutes

15 U.S.C. § 1 (1976) ..... *passim*
15 U.S.C. § 2 (1976) 17
15 U.S.C. § 14 (1976) 19

Legislative Materials

H.R. REP. No. 1191, 81st Cong., 1st Sess. 8 (1949) 22

SENATE COMM. ON THE JUDICIARY, APPLICABILITY OF THE ANTITRUST LAWS TO CERTAIN ASPECTS OF DESIGNATED ORGANIZED PROFESSIONAL TEAM SPORTS, S. REP. No. 1303, 88th Cong., 2d Sess. (1964) 8

Other Authorities

Bork, *Ancillary Restraints and the Sherman Act*, 15 A.B.A. SEC. ANTITRUST 211 (1959) 8, 10

Bork, *Resolved: Present Antitrust Restraints on Pricing Should be Relaxed*, 41 A.B.A. ANTITRUST L.J. 5 (1971) 8

Handler & Smart, *The Present Status of the Intra-corporate Conspiracy Doctrine*, 3 CARDOZO L. REV. 23 (1981) 15

L. KOPPETT, SPORTS ILLUSION, SPORTS REALITY (1981) 8

Neale, *The Peculiar Economics of Professional Sports*, 78 Q.J. ECON. 1 (1964) 10

PAGE

NFL Option Contracts and Common Player Draft Will Not Be Examined by Justice, [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 405 (Apr. 15, 1969) 8

Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 HARV. L. REV. 661 (1982) .. 15

Note, *The N.F.L.'s Final Victory Over Smith* v. *Pro-Football, Inc.: Single Entity-Interleague Economic Analysis*, 27 CLEV. ST. L. REV. 541 (1978) 8

J. WEISTART & C. LOWELL, LAW OF SPORTS (1979) 9, 10

IN THE

Supreme Court of the United States

October Term, 1981

No. 81-

NATIONAL FOOTBALL LEAGUE, *et al.*,

Petitioners,

—against—

NORTH AMERICAN SOCCER LEAGUE, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The National Football League and those of its component teams named as parties to this action (collectively, the "NFL") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the Court of Appeals is reported at 670 F.2d 1249 and appears in Appendix A hereto. The opinion of the District Court is reported at 505 F. Supp. 659 and appears in Appendix B hereto.

Basis of Jurisdiction

The judgment of the Court of Appeals is dated January 27, 1982 and was entered on January 26, 1982. A petition for rehearing was filed on February 10, 1982 and was

denied on March 17, 1982. The Order denying rehearing appears in Appendix C hereto. Jurisdiction in this Court exists pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the District Court was founded upon 28 U.S.C. §§ 1331 and 1337.

Statute Involved

This case involves a single statute, 15 U.S.C. § 1, which provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Statement of the Case

This action was brought in 1978 by the North American Soccer League and certain of its then member clubs (collectively, the "NASL") to challenge the validity of a proposed NFL constitution and by-law provision which undertook to put teeth into a long-standing league policy prohibiting "controlling" owners[1] and chief managing of-

[1] For purposes of this case, and as used in this petition, "controlling" NFL club owners are those described in proposed § 9.4(A) of the NFL Constitution and By-Laws. *See* 670 F.2d at 1255 (Appendix A at 12a).

ficers of NFL clubs from maintaining conflicting ownership roles in other major sports leagues, including (but not limited to) the NASL. The complaint, brought under § 1 of the Sherman Act, 15 U.S.C. § 1, sought damages and an injunction against enforcement of the challenged provision, both in general and particularly insofar as it would have compelled two individuals, Mr. Lamar Hunt and Mr. Joseph Robbie, to divest themselves within a fixed time of either their NFL or their NASL ownership interests.[2]

The NFL's proposed by-law was challenged as a group boycott, allegedly illegal *per se*, and as an otherwise unreasonable restraint of trade among horizontal competitors. The District Court found no merit to the NASL's claims and entered judgment for the NFL. It held, first, that in determining ownership conflict of interest requirements (here involving a directly competing league) the NFL and its constituent clubs had acted as a single economic entity and thus had not contracted, combined or conspired with other relevant actors within the meaning of § 1 of the Sherman Act. 505 F. Supp. at 691 (Appendix B at 101a). Second, and irrespective of whether a plurality of actors existed for § 1 purposes, the District Court held that the NASL failed to prove the existence of any product market in which the proposed NFL by-law would operate to restrain trade in any material way. 505 F. Supp. at 683 (Appendix B at 82a).

The NASL appealed to the Court of Appeals for the Second Circuit, which reversed both of the District Court's holdings. The Court of Appeals noted that the sports league relationship involves a high degree of economic and business

---

[2] Mr. Hunt at the time was a controlling owner of both the NFL Kansas City Chiefs and the NASL Dallas Tornado. Mr. Robbie and his wife together control the NFL Miami Dolphins and the NASL Fort Lauderdale Strikers.

interdependence, 670 F.2d at 1251, 1253 (Appendix A at 4a, 7a), and that damage to any club can adversely affect the stability, success and operations of the entire league. It nevertheless found, despite the NFL's sharing of 90 to 95 percent of league revenues on a 50-50 or 60-40 basis, that "the financial performance of each team, while related to that of the others, does not . . . *necessarily* rise or fall with that of the others." 670 F.2d at 1252 (Appendix A at 5a; emphasis added). On this reasoning, the Court of Appeals held that the league relationship should be disregarded and that the proposed NFL by-law in issue represented a Sherman Act conspiracy among separate business enterprises which would have the effect of damaging the competing NASL.

The Court of Appeals also found that "the record disclose[d] a separate market for sports capital and skill," 670 F.2d at 1260 (Appendix A at 24a), said to consist of capital possessed by "investor[s who] . . . must measure up to a profile having certain characteristics," as distinct from capital possessed by "financiers of the type prevailing in most business markets." *Id.* at 1260, 1253 (Appendix A at 25a, 8a). Within this "market," the Court of Appeals held that the NFL had "restrain[ed] at least some NASL teams from competing effectively against NFL teams," *id.* at 1259 (Appendix A at 22a), because enforcement of the NFL's proposed league rules against cross-ownership and interlocking directorates between competing leagues "would foreclose NASL's teams from continued enjoyment of and access to a significant segment of the market supply of sports capital and skill. . . ." *Id.*

Although noting that the "restraint involved here" might be viewed as "[v]ertical" in nature between the single entity NFL and its "owners," *id.* at 1258 n.5 (Appen-

dix A at 18a-19a), the Court of Appeals did not refer to any of this Court's decisions concerning vertical market foreclosure and instead stated the applicable law as follows:

> [T]he Sherman Act . . . does not require proof of the precise boundaries of the sports capital market or the exact percentage foreclosed; it is sufficient to establish, as was done here, the general outlines of a separate submarket of the capital market and that the foreclosed portion of it was likely to be significant.

Id. at 1261 (Appendix A at 26a). Having thus presumed that a "likely" foreclosure, of unstated size, within the "general outlines" of an otherwise undefined "sports capital" market, had effected a "significant" restraint of trade, the Court of Appeals then "balanced" the "anticompetitive effects" thus presumed against the procompetitive effects of the proposed NFL by-law.

In striking this balance, the Court of Appeals held that the NFL was "required to come forward with proof that any legitimate purposes [for its league rule] could not be achieved through less restrictive means." *Id.* at 1261 (Appendix A at 26a). The Court of Appeals found that the NFL had failed to prove this negative. *Id.* The NFL's remaining contentions were dismissed as "not substantial and . . . clearly outweighed by [the proposed rule's] . . . anticompetitive purpose and effect." *Id.* (Appendix A at 27a).

The Court of Appeals accordingly held that the proposed NFL cross-ownership provision unreasonably restrained trade in violation of § 1 of the Sherman Act and reversed with instructions to enter a permanent injunction against its enforcement. 670 F.2d at 1262 (Appendix A at 28a). The NFL filed a timely petition for rehearing, which was denied on March 17, 1982.

ARGUMENT

The Court of Appeals held that the NFL may not divorce itself from and compete unreservedly with the NASL, but instead must curb the competition in order to help a smaller competitor. The NFL believes that this decision is at variance with core antitrust decisions of this Court and also with common sense.

This appears to be the first judicial decision in which a court has overturned as *anti*competitive a rule *preventing* the common ownership of horizontal competitors. Although the parties stipulated that "[t]he primary economic competition involving professional sports leagues occurs between and among the competing leagues," 505 F. Supp. at 674 (Appendix B at 60a-61a), rather than between individual teams, the Court of Appeals disregarded the principal competitive arena and looked to the teams individually in finding an unlawful combination and conspiracy. 670 F.2d at 1257 (Appendix A at 18a). It thus rejected the NFL's argument that, as in those cases where no conspiracy is found in joint actions by parents and subsidiaries, Sherman Act "persons" must be separate economic entities. In this case, as the District Court correctly held and the parties themselves agreed, the relevant economic entities are leagues, not teams.

The decision below departs completely from the cardinal antitrust principle, reflected in congressional mandates against business combinations, that competitors must be separate and independent of one another. Instead, it requires the NFL to subsidize and strengthen teams in a directly competing league by permitting such teams to be purchased by the NFL's own controlling owners. This court-approved combination of competing sports leagues,

which are avowed horizontal competitors, perverts both the letter and spirit of the Sherman Act.

In addition, the Court of Appeals found an unreasonable restraint of trade in a product—investment capital—which the soccer league conceded to be "fungible." This holding was based upon the court's *de novo* finding that the NFL by-law, if adopted, would effect a "market foreclosure" of unstated dimension and as to which the NFL purportedly had not "come forward with proof" of the unavailability of "less restrictive means." 670 F.2d at 1261 (Appendix A at 26a).

If allowed to stand, the holding below would mean that the antitrust "Rule of Reason" is designed to protect business competitors rather than promote business competition and that internal decisions of sports leagues directed at ending conflicts of interest and assuring free and open competition constitute antitrust violations because the NFL has failed to prove a negative: that its "legitimate purposes could not be achieved through less restrictive means." *Id.*

I.

The Court of Appeals Evaluated the Internal Decisions of a Professional Sports League According to Entirely Inappropriate Legal Standards.

The application to professional sports leagues of legal rules, including antitrust principles, which were developed in business contexts entirely foreign to the sports league business relationship, has created virtual judicial havoc: each court acts as a mini-legislature, free to develop entirely new standards of antitrust review for the case before it. Thirty years of antitrust history have demonstrated that the federal courts are unable to cope with the sports league structural issue in the absence of more definitive guidelines.

The NFL respectfully submits that the time has come for direction from this Court.[3]

Although this Court has had occasion periodically to consider *whether* the antitrust laws apply to professional sports leagues,[4] the Court never has addressed the issue of *how* the antitrust laws should apply to their internal decision making. Lower courts have groped in vain for precedential

---

[3] In the recent words of one commentator, the relation of professional sports to the antitrust laws "cries out for clarification," and the absence of predictable principles puts "an unfair burden on this industry." L. KOPPETT, SPORTS ILLUSION, SPORTS REALITY 282 (1981). The problem has been building for some time. Eleven years ago, former U.S. Solicitor General Robert Bork concluded that this Court ultimately would have to reconcile sports league structure with antitrust doctrine:

> There are some activities . . . which could not exist at all without the restraint and these should be lawful no matter what the market share of the parties. A prime example is league sports . . . . Sooner or later the [Supreme] Court is going to have to face the issues raised by the restraints in organized sports, and this solution [agreements permitted within a single league] seems to me dictated by the needs of leagues and by the analogy of the league to partnerships or firms." Bork, *Resolved: Present Antitrust Restraints on Pricing Should be Relaxed*, 41 A.B.A. ANTITRUST L.J. 5, 13 (1971).

See also Bork, *Ancillary Restraints and the Sherman Act*, 15 A.B.A. SEC. ANTITRUST 211, 233 (1959); SENATE COMM. ON THE JUDICIARY, APPLICABILITY OF THE ANTITRUST LAWS TO CERTAIN ASPECTS OF DESIGNATED ORGANIZED PROFESSIONAL TEAM SPORTS, S. REP. No. 1303, 88th Cong. 2d Sess. 6 (1964); *NFL Option Contracts and Common Player Draft Will Not Be Examined by Justice*, [Jan.-June] *Antitrust & Trade Reg. Rep.* (BNA) No. 405 (Apr. 15, 1969) (response of former Assistant Attorney General Richard W. McLaren to Rep. William T. Cahill (R-N.J.)); Note, *The N.F.L.'s Final Victory Over Smith* v. *Pro-Football, Inc.: Single Entity-Interleague Economic Analysis*, 27 CLEV. ST. L. REV. 541 (1978).

[4] *See Flood* v. *Kuhn*, 405 U.S. 258 (1972); *Radovich* v. *National Football League*, 352 U.S. 445 (1957); *United States* v. *International Boxing Club of New York, Inc.*, 348 U.S. 236 (1955); *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953); *Federal Baseball Club of Baltimore, Inc.* v. *National League*, 259 U.S. 200 (1922).

guidance, only to invoke inappropriate antitrust principles designed for horizontal business competitors and their trade associations.

Professional sports leagues do not represent a form of "cooperation" among otherwise independent business competitors. Nor are they joint ventures formed as a matter of discretion for purposes of improving the marketing of separately produced products or promoting greater efficiency among competitors in an industry. On the contrary, they are joint producers of a single common entertainment product. While the operating units of the league are separate organizations in form, they typically are created by the league in the first instance, can have no independent existence outside their league, and as a general matter are not economic competitors of one another.[5]

On the playing field, the teams are intensely competitive —and every effort is made to preserve and sharpen that competition. But in producing and marketing the league product, which for the National Football League is uniformly high quality football presented in the format of an annual seasonal race, the clubs necessarily are co-producers and co-sellers, not competitors. They are functionally incapable of operating independently. They act as partners in a common business enterprise, bound in a symbiotic relationship without parallel anywhere else in American business.[6]

---

[5] *Smith* v. *Pro-Football, Inc.*, 593 F.2d 1173, 1179 (D.C. Cir. 1978).

[6] As the leading academic commentators on sports law have written,

> [T]here is a great deal of economic interdependence among the clubs comprising a league. They jointly produce a product which no one of them is capable of producing alone. In addi-

(footnote continued on following page)

Such an enterprise is obviously lawful. It is conceived as a method of making possible a particular form of entertainment product and presents no antitrust issues in its inception.

(footnote continued from preceding page)

tion, the success of the overall venture depends upon the financial stability of each club. [*See generally United States* v. *National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953); Bork, *Ancillary Restraints and the Sherman Act*, 15 ABA ANTITRUST SECTION 211, 231-34 (1959); Neale, *The Peculiar Economics of Professional Sports*, 78 Q.J. Econ. 1 (1964).] The members must, therefore, refrain from direct, interfirm economic competition and, in fact, do utilize various cross-subsidy devices to compensate for the natural inequities arising from differences in the economic potential of various franchise locations.

Since a league's member-clubs do not compete with one another, it seems inappropriate to make them subject to legal principles designed to control the behavior of firms which are fundamentally different. In its basic nature, a league-firm is not a conspiracy. To treat it as such is to force results which are unlikely to achieve any purpose intended by Congress.

This is not to say that a league's operation enjoys complete antitrust immunity. Rather, what it means is that we must select a different antitrust frame of reference for judging the league's conduct. J. WEISTART & C. LOWELL, LAW OF SPORTS § 5.11, at 757-58 (1979).

There are various types of national partnerships which present interesting analogies to sports leagues. One could imagine a large accounting firm organized as a partnership in which each of the partners contributed his own capital and in which the individual's economic return was influenced by both the output of the local offices which each controlled and the overall success of the business. Thus, there might be a general sharing in partnership receipts as well as a system for rewarding individual output. . . . Since competition among the firm's various offices is neither an intended nor a desirable goal of the particular form of business organization, there appears to be no reason to apply a rule of law which was designed to solve different problems. While the analogy between a sports league and a partnership is not a precise one, there is considerable similarity, and on the element which is most relevant here—mutual interest in cooperation, rather than competitive action—the comparison seems appropriate. *Id.* § 5.11, at 699-700 (footnotes omitted).

Sports leagues do not develop as methods of restraining trade, since only by venturing together can the clubs produce and market a product which otherwise would not exist. *Cf. Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 21-23 (1979). The NFL's product competes head-to-head with the products of other sports leagues and with other forms of entertainment in the highly competitive entertainment market. The operating principles of such lawful ventures, developed by agreement among the joint venturers themselves, should not be subject to *ad hoc* judicial review as though they were agreements and conspiracies among economically independent persons. *See United States* v. *Morgan*, 118 F. Supp. 621, 689-91 (S.D.N.Y. 1953).

Experience has shown, however, that the lower Federal courts have undertaken to accept or reject at will the "jointness" of a professional sports league venture without giving any effect to the inherent rights, privileges and business needs of the league relationship. Intraleague agreements, understandings and operating principles thus regularly are subjected to case-by-case Rule of Reason adjudications under either utterly inapposite standards or no identifiable standards whatever. A sampling of the decided cases illustrates the basic confusions, conflicts and irrationalities which permeate sports law:

—The NFL is "a *unique type of business*," not like an "ordinary business," and its clubs "must *not compete* too well with each other *in a business way*." *United States* v. *National Football League*, 116 F. Supp. 319, 323 (E.D. Pa. 1953) (emphasis added).

—The NFL is like any other business and "open *unfettered competition*" must take place among its clubs. *Bowman* v. *National Football League*, 402 F. Supp. 754, 756 (D. Minn. 1975) (emphasis added).

—Professional baseball is "a single, unified but stratified organization." *Flood* v. *Kuhn*, 316 F. Supp. 271, 273 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

—The NFL is a "unique or novel" business organization having "*some* of the characteristics of a joint venture." *Mackey* v. *National Football League*, 543 F.2d 606, 619 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977) (emphasis in original).

—The NFL clubs "[l]ike any other organizations . . . are subject to the antitrust laws . . . the team-sport or joint-venture nature of their operations notwithstanding." *Smith* v. *Pro-Football, Inc.*, 420 F. Supp. 738 (D.D.C. 1976), *rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978).

—The "*individual members*" of a professional basketball league are like a "private government." *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F. Supp. 1049, 1061 (C.D. Cal. 1971) (emphasis added).

—Professional basketball clubs are "*joint venturers* . . . dependent upon one another as *partners*." *Levin* v. *National Basketball Association*, 385 F.Supp. 149, 150 (S.D.N.Y. 1974) (emphasis added).

—Professional basketball clubs operate in a "*common enterprise*" and a "*joint venture*." *Hawkins* v. *National Basketball Association*, 288 F. Supp. 614, 621 (W.D. Pa. 1968) (emphasis added).

—Professional hockey is "one single business enterprise." *San Francisco Seals, Ltd.* v. *National Hockey League*, 379 F. Supp. 966, 969 (C.D. Cal. 1974).

—The NFL may properly be considered a "single economic entity." *North American Soccer League*

v. *National Football League*, 505 F. Supp. 659, 688 (S.D.N.Y. 1980) (Appendix B at 94a-95a), *rev'd in part*, 670 F.2d 1249 (2d Cir. 1982) (Appendix A).

—The NFL *is not* a "single business entity." *Los Angeles Memorial Coliseum Commission* v. *National Football League*, 519 F. Supp. 581, 585 (C.D. Cal. 1981).

—The NFL teams "are not *competitors* in any economic sense. The clubs operate basically as a joint venture. . . ." *Smith* v. *Pro-Football, Inc.*, 593 F.2d 1173, 1179 (D.C.Cir. 1978) (emphasis in original).

The decision below illustrates not only the antitrust confusion but also the anticompetitive results which follow from applying separate enterprise principles to internal professional sports league decisions and operating agreements. The Court of Appeals held that "NFL teams are separate economic entities engaged in a joint venture," 670 F.2d at 1252 (Appendix A at 5a), but attached no antitrust significance to that conclusion. The Court of Appeals offered no discussion of whether the challenged by-law was an "ancillary restraint" which was reasonable or inherent in joint venture terms. The basic antitrust principles prohibiting interlocking directorates among competing enterprises [7] were held to be irrelevant because the NFL is not

[7] The Court of Appeals expressly held that the NASL and the NFL were closely competitive, 670 F.2d at 1252 (Appendix A at 6a-7a), but applied that fact as a ground for challenging rather than justifying the NFL's proposed rule. The NFL and NASL had stipulated before trial, in several formulations, that the leagues are competitive and that the primary competition between the two is at the *league versus league* level:

(footnote continued on following page)

organized in "corporate" form. 670 F.2d at 1262 (Appendix A at 28a). The NFL was thus enjoined to stop "conspiring" with itself and to allow ownership affiliation by its key personnel with a directly competing league as a means of enabling the latter to compete "successfully" with the NFL. Sports leagues apparently now are free to "compete" by buying up one another's operating units in the interest of "efficiency" or "success."

(footnote continued from preceding page)

> The NASL and its member teams (whether organized in corporate or any other form) compete with the NFL and its member teams (whether organized in corporate or any other form) in interstate commerce. Such competition *exists primarily on an interleague basis.* NASL Proposed Finding No. 108, contained in the Pre-Trial Order (A385) at A496, Vol. II (emphasis added). (Citations in the form "A—" refer to the Joint Appendix filed with the Court of Appeals.)
>
> • • •
>
> The NASL and the NFL are two of the major professional sports leagues in the United States. Each is composed of member teams located throughout the United States (and, in the case of the NASL, in parts of Canada) which compete on the playing field with each other and also *operate jointly* to promote attendance at and fan interest in the games which they play and to create and market professional athletic entertainment events *in competition with other sports leagues* (and other producers and marketers of sports and other entertainment events). Agreed Finding of Fact No. 8, contained in the Pre-Trial Order (A385) at A392, Vol. II (emphasis added).
>
> • • •
>
> The NASL and NFL, along with the other major professional sports *leagues* in hockey, basketball and baseball, *compete with each other* in the entertainment industry. Agreed Finding of Fact No. 9, contained in the Pre-Trial Order (A385) at A392, Vol. II (emphasis added).
>
> • • •
>
> The NASL, the NFL and other major professional sports *leagues* all *compete* in interstate commerce for fan interest, media attention, advertising revenues and network television revenues. The primary 'products' sold to the public by the individual sports leagues and/or their member teams, includ-

(footnote continued on following page)

This perverse result arises from the combination of "intra-enterprise" conspiracy concepts [8] and Rule of Reason tests, developed in wholly unrelated business situations, in a way which ignores the sports league relationship entirely.

(footnote continued from preceding page)

> ing the NFL and NASL, are tickets for spectator viewing and the broadcast rights to games which the individual clubs play with other league members. Agreed Finding of Fact No. 10, contained in the Pre-Trial Order (A385) at A392-A393, Vol. II (emphasis added).
>
> • • •
>
> *Competition between the NASL and NFL* has grown over the past few years because of the similarity *between the two sports* and the overlaps between their seasons, their franchise locations and, in some cases, their stadiums. Agreed Finding of Fact No. 19, contained in the Pre-Trial Order (A385) at A397, Vol. II (emphasis added).
>
> • • •
>
> "The effectiveness of *competition* in the major professional team sports market thus depends on the level of rivalry *between* the five existing major *leagues*. . . ." Testimony of NASL expert witness Louis Guth at A524, Vol. II (emphasis added). When asked whether it is fair to say that the price competition in the professional team sports market occurs *between and among leagues* rather than between local teams in separate sports, Mr. Guth replied, "I think that is generally true and *specifically with regard to the issues in this proceeding it is true.*" Guth, Tr. 1897, Vol. XI of Joint Appendix (emphasis added).

[8] The problem of defining an enterprise for § 1 analysis is unsettled in many other business contexts, as well. The intracorporate conspiracy notion "is a doctrine with numerous critics and few friends." Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 CARDOZO L. REV. 23 (1981). *See also* Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 HARV. L. REV. 661 (1982).

At least three Circuits—the Seventh, Eighth and Ninth—have adopted an "all the facts and circumstances" test at odds with the rigid rules of formally separate legal entities employed by the Second Circuit in the present case. *E.g., Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581 (8th Cir. 1981); *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977). *See generally* Handler & Smart, *supra*, at 55-61.

The NFL submits that this Court did not intend that cases such as *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978), and *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951), be applied in a fashion which transforms the recognized antitrust law applicable to joint ventures and business partnerships into a directive that their business decisions and operating policies be carried out in a manner which tends to encourage or promote the business success of their competitors—and which thereby denies them the right to compete openly in the marketplace pursuant to their own legitimate competitive business inerests.

It is the *process of competition* that the antitrust laws are designed to serve and not the protection of the business success of particular competitors; but the latter is the ruling here. The Court of Appeals held that the NFL is a "joint venture" of "separate economic entities," 670 F.2d at 1252 (Appendix A at 5a)—which is fundamentally true of any business joint venture or business partnership. Because it is an organization of that character, the Court of Appeals held that "conspiracy" principles can be applied. *Id.* at 1256-1258 (Appendix A at 16a-18a). Because "conspiracy" principles are applicable, the court reasoned, § 1 requires that sports league practices and internal agreements must be more pro-competitive than anti-competitive. *Id.* at 1259 (Appendix A at 21a-22a). But this was taken to mean that a sports league may not operate with any internal policies or competitive agreements which potentially handicap the business success of a competing league—*even where such policies tend to promote rather than limit business competition between the two leagues.* Under such a view of § 1, a sports league's decisions to enlarge its operations, to extend the length of its season, to make greater use of television, or to prevent conflicts of interest within its own

managing board all are open to challenge under § 1 on the ground that "conspiracy" has taken place which may disadvantage the league's business competitors.

This is not an *antitrust* principle; it is a regulatory principle.

A sports league, as a business competitor of other sports leagues and in the entertainment market generally, must comply with § 2 of the Sherman Act, 15 U.S.C. § 2. But no § 2 issues are presented by this case, for the NFL has no "monopoly" of investment capital or sports management skills, as the record below made clear. 505 F. Supp. at 665-66, 681-83 (Appendix B at 39a-42a, 78a-82a). By finding an anticompetitive motive in a procompetitive practice, the Court of Appeals in effect transformed the NASL's § 1 claim into a § 2 case despite the absence of the required elements of § 2. Rather than acknowledge this, the court made up a new § 1 principle apparently to be applied to all sports leagues, joint ventures, and group organizations: such enterprises, however valid in their inception, may not, in choosing their marketing techniques or pursuing their own business interests, arrive at any internal agreements which are inconsistent with the business interests of their competitors.

If each federal court confronted with a professional sports league antitrust issue is free to find a meaning for "procompetitive" and "anticompetitive" in this vagrant manner, litigation involving such practices will continue to multiply and irreconcilable results will abound. Particularly where the undisputed record reveals intense horizontal competition between the entertainment products of two rival sports league enterprises, an appellate court mandate that "combination" of those competitors is compelled by § 1 of the Sherman Act can create nothing but the most profound precedential mischief.

II.

The Court of Appeals Ignored This Court's Decisions Governing Sherman Act Market Definition and Measurement.

The NFL by-law at issue in this case "restrains," if anything, controlling NFL club owners' decisions concerning where they may invest their spare cash not already committed to the operation of their NFL clubs. This action was brought to enable certain controlling NFL club owners to invest their money in NASL teams. The Court of Appeals thus framed the substantive issue essentially as one of vertical market foreclosure, *i.e.*, whether the proposed NFL league rule would "foreclose" substantial sources of investment capital to NASL teams. But in imputing antitrust significance to this alleged foreclosure, the Court of Appeals departed from the teachings of this Court.

A. Sherman Act Product Markets Must Be Defined According to Product Characteristics, Not Seller Characteristics.

The disputed NFL cross-ownership rule, like any conflict of interest provision, represents a form of exclusive dealing arrangement obliging controlling NFL club owners to refrain from purchasing NASL or other competing major league sports teams.[9] This Court has held that "an exclusive-dealing arrangement . . . does not violate the [antitrust laws] . . . unless the court believes it probable that performance of the contract will foreclose competition in a *substantial share* of the line of commerce affected." *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327

[9] *See* 670 F.2d at 1255 (Appendix A at 12a-13a) (quoting the rule at issue).

(1961) (emphasis added).[10] The first step in such an analysis, as the Court of Appeals recognized, "must be" to determine the relevant "line of commerce, *i.e.*, the type of goods, wares or merchandise, etc., involved . . . on the basis of the facts peculiar to the case." *Id.* (footnote omitted).

The NFL's proposed by-law, on its face, would "restrain" nothing but the movement of investment capital: money. *Cf. United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610 (1977) (the "credit market"). It is "capital investment" which the NASL purportedly seeks to unleash, 670 F.2d at 1255 (Appendix A at 13a), and "ownership interests" which the NFL's proposed league rule solely affects. *Id.* (Appendix A at 12a). But to avoid the obvious conclusion that a dollar is a dollar and "capital is fungible," [11] the Court of Appeals found that a distinct and separate "sports capital" submarket exists, whose "supply side" is made up of capital possessed by "individuals or businesses with distinct characteristics as distinguished from the much larger number of financiers of the type prevailing in most business markets." 670 F.2d at 1260, 1253 (Appendix A at 25a, 8a).

This finding, which the Court of Appeals concededly made *de novo*,[12] rested upon a striking departure from this

---

[10] The holding of this Court in *Tampa Electric*, which was rendered under § 3 of the Clayton Act, applies *a fortiori* to claims bottomed upon § 1 of the Sherman Act. *See* 365 U.S. at 335; *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1239 (3d Cir. 1975).

[11] The NASL conceded this fact below. Reply Brief for Plaintiffs-Appellants-Cross-Appellees, at 14.

[12] *See* 670 F.2d at 1260 (Appendix A at 24a). In basing its decision upon facts found *de novo* at the appellate level, the Court of Appeals evidently—and improperly—assumed the "function of the District Court." *Schine Chain Theatres, Inc.* v. *United States*,

(footnote continued on following page)

Court's decision in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962). In *Brown Shoe*, the Court held that "submarkets may exist which, in themselves, constitute product markets for antitrust purposes," 370 U.S. at 325, and explained this holding as follows:

> The boundaries of . . . a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the *product's* peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Id. (footnote omitted) (emphasis added), *quoted at* 670 F.2d at 1260 (Appendix A at 24a). Contrary to the decision below, the quoted passage directs antitrust market definition to the characteristics of *products*, not *sellers*. Neither *Brown Shoe* nor any other antitrust decision of this Court permits a product "submarket" to be defined as limited to a plaintiff's preferred selection of sellers who offer an otherwise fungible commodity. Market definition turns not upon where an antitrust plaintiff arbitrarily *chooses* to look for supplies, but upon where such a person "*can practicably turn* for supplies." *Tampa Electric*, 365 U.S. at 327 (emphasis added). *See United States* v. *Connecticut National Bank*, 418 U.S. 656, 668 (1974).

The decision below contains no mention of where the NASL can practicably turn for supplies of investment

---

(footnote continued from preceding page)

334 U.S. 110, 124 (1948). Indeed, the District Court, after hearing all the evidence and closely observing many of the owners themselves, expressly found that "[t]he NASL has not proved that present sports owners have such peculiar characteristics as to justify constituting them a separate and distinct economic submarket." 505 F. Supp. at 683 (Appendix B at 82a).

capital, because the Court of Appeals instead defined the relevant "market" according to respondents' expressed subjective preferences among suppliers. In economists' terms, the market was defined as a single point on the supply curve rather than as the curve itself. If correct, this approach would compel the conclusion that any seller of anything, regardless of market share, can make up the "supply side" of a product "submarket" if it is unfortunate enough to have coloratively "distinct characteristics" which an antitrust plaintiff, for his own reasons, finds attractive. Nothing could be further removed from this Court's precedents concerning antitrust market definition, which uniformly call for factual analysis of *product* interchangeability. *See, e.g., United States* v. *E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593-94 (1957); *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956).

B. Market Foreclosure, as a Form of Antitrust Injury, Cannot Be Found Unlawful Without Regard To Market Size or Market Impact.

Perhaps because its market definition rested entirely upon facts found *de novo* at the appellate level, the Court of Appeals made no effort to express in numerical terms the volume of trade in "sports capital" which the NFL was held to have restrained. Compared with the rigorous analysis of this Court's prior cases,[13] the decision below is impressionistic at best: controlling NFL club owners, according to the Court of Appeals, "likely" supply a "significant portion" of the "sports capital market" 670 F.2d at 1260-61 (Appendix A at 25a-26a). A violation of § 1

[13] *See, e.g., Brown Shoe*, 370 U.S. at 328-35; *Tampa Electric*, 365 U.S. at 329-35; *Standard Oil Co.* v. *United States*, 337 U.S. 293, 295-99, 309-14 (1949). *See also Fruehauf Corp.* v. *FTC*, 603 F. 2d 345, 352-61 (2d Cir. 1979); *Susser* v. *Carvel Corp.*, 332 F.2d 505, 514 (2d Cir. 1964), *cert. dismissed*, 381 U.S. 125 (1965).

of the Sherman Act, the NFL respectfully urges, cannot rest on so meager a foundation.

Had the Court of Appeals adhered to this Court's precedents, it would have analyzed the record to determine "the proportionate volume . . . as to which the challenged contract pre-empted competition," *Tampa Electric*, 365 U.S. at 333, and on that basis reached a conclusion whether the proposed NFL by-law would have been unlawful. The conspicuous absence in the opinion below of any market share data of any sort reflects the extent to which this Court's precedents were ignored by the Court of Appeals.[14]

"[T]he inquiry," under § 1 of the Sherman Act, "is confined to a consideration of impact on competitive conditions." *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 690 (1978). Market foreclosure can have such an impact only if it "deprive[s] . . . rivals of a fair opportunity to compete," *Brown Shoe*, 370 U.S. at 324 (quoting H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1949)), in terms of the remaining supplies of the commodity affected. The decision below, however, rests upon no finding of actual or probable market effects. A finding of market impact could only have followed from a quantitative analysis of foreclosure which, despite this Court's decisions, the Court of Appeals deemed irrelevant: "it is sufficient to establish . . . the general outlines of a separate submarket of the capital market and that the foreclosed por-

---

[14] Based upon undisputed facts in the record, even assuming the existence of an unrealistically limited "sports capital" market consisting solely of owners of professional sports teams, all of the NFL controlling owners—38 individuals—together comprised only 0.71% of the total number of owners of major league sports teams. This figure is strikingly close to that found in *Tampa Electric*, 0.77%, which this Court labeled "quite insubstantial." 365 U.S. at 333. *See* NFL Petition for Rehearing, at 9 (filed Feb. 10, 1982).

tion of it was likely to be significant." 670 F.2d at 1261 (Appendix A at 26a).

This holding is at war with this Court's decisions in *Professional Engineers* and *Tampa Electric*. It allows antitrust liabilities to be found irrespective of market consequences and announces a new and unexplained rule of foreclosure—"significant portion"—against which no contract could ever be safe from antitrust attack. *Compare Tampa Electric*, 365 U.S. at 329 (outlining the many determinants of whether a market foreclosure is "substantial").

III.

The Rule of Reason Cannot Require Antitrust Defendants to Disprove the Possibility of So-Called Less Restrictive Alternatives.

In evaluating the NFL's league ownership rules under the Rule of Reason, the Court of Appeals considered whether those rules "promote[d] competition or . . . suppress[ed] competition." 670 F.2d at 1259 (Appendix A at 21a) (quoting *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978)). In so doing, however, the court below adopted a new principle of decision: that the antitrust "reasonableness" of any internal league business decision requires that the defendants prove the *absence* of so-called less restrictive alternatives:

> [T]he NFL was required to come forward with proof that any legitimate purposes [underlying the proposed league by-law] could not be achieved through less restrictive means. This it has failed to do. The NFL, for instance, has shown no reason why it could not remedy any conflict of interest arising out of NFL-NASL competition for broadcast rights by re-

> moving cross-owners from its broadcast rights negotiating committee.

670 F.2d at 1261 (Appendix at 26a). This holding puts a defendant to an impossible standard of proof and conflicts with this Court's decision in *Professional Engineers* and with that of the Court of Appeals for the Third Circuit in *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975).[15]

The court below nowhere defined what it meant by "less restrictive means," although the concept presumably is similar to that which this Court has recognized in determining the permissibility of state trade "restraints" under the Commerce Clause. *See, e.g., Hughes* v. *Oklahoma*, 441 U.S. 322 (1979); *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). But this

---

[15] *American Motor Inns* considered a requirement that the defendant's motor inn franchisees hold no ownership interests in competing motor inn chains. 521 F.2d at 1236 n.3. To the plaintiff's contention that "less restrictive alternatives" existed to preserve the various purposes urged in support of the ownership restriction, the court held as follows:

> In its descriptions of the rule of reason inquiry, the Supreme Court has never indicated that, regardless of the other circumstances present, the availability of an alternative means of achieving the asserted business purpose renders the existing arrangement unlawful if that alternative would be less restrictive of competition no matter to how small a degree . . . .
>
> Application of the rigid "no less restrictive alternative" test in cases such as this one would place an undue burden on the ordinary conduct of business. Entrepreneurs such as [defendant Holiday Inns, Inc.] would then be made guarantors that the imaginations of lawyers could not conjure up some method of achieving the business purpose in question that would result in a somewhat lesser restriction of trade. And courts would be placed in the position of second-guessing business judgments as to what arrangements would or would not provide "adequate" protection for legitimate commercial interests.

521 F.2d at 1249-50 (footnote omitted).

Court's antitrust precedents—and simple logic—refute any supposition that an alleged restraint of trade cannot be "reasonable" under § 1 of the Sherman Act unless the defendants prove that their purposes *"could not* be achieved through less restrictive means." 670 F.2d at 1261 (Appendix A at 26a; emphasis added).

It is the purpose of antitrust remedies to preserve "the conflict for advantage called competition—the play of the contending forces ordinarily engendered by an honest desire for gain." *United States* v. *American Linseed Oil Co.*, 262 U.S. 371, 388 (1923). If that purpose is not impaired, if an alleged restraint does not exhibit an overall "monopolistic tendency," *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959) (quoting *Standard Oil Co.* v. *United States*, 221 U.S. 1, 57 (1911)), then the purported existence of "less restrictive alternatives" is simply irrelevant: the Sherman Act prohibits restraints of trade, not alleged failures to create competition or advantages for competitors.

A "balance" of procompetitive and anticompetitive effects, as reflected in a factual record, can yield an overall favorable "impact on competitive conditions," *Professional Engineers*, 435 U.S. at 690, regardless of whether, under an ill-defined "less restrictive means" test, that impact could be still *more* favorable. The Rule of Reason lacks all reason if, regardless of demonstrated impact on competitive conditions, a violation of the Sherman Act could stand on the defendants' failure to anticipate and to *disprove* the efficacy of each and every "less restrictive alternative" which a plaintiff might imagine and suggest.

Conclusion

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

WILLIAM E. WILLIS
Attorney for Petitioners
125 Broad Street
New York, New York 10004
(212) 558-4000

JAMES H. CARTER
HOWARD D. BURNETT
JAMES W. DABNEY
SULLIVAN & CROMWELL
Of Counsel

June 15, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Dockets 80-9153, 81-7003

NORTH AMERICAN SOCCER LEAGUE, *et al.*,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE, *et al.*,

Defendants.

Argued Oct. 19, 1981.

Decided Jan. 27, 1982.

Before LUMBARD, MANSFIELD and VAN GRAAFEILAND, *Circuit Judges.*

IRA M. MILLSTEIN, New York City (James W. Quinn, Irwin H. Warren, Jeffrey L. Kessler, Kenneth L. Steinthal, Weil, Gotshal & Manges, New York City, of counsel), for plaintiffs-appellants-cross-appellee.

WILLIAM E. WILLIS, New York City (James H. Carter, Howard D. Burnett, James W. Dabney, Sullivan & Cromwell, New York City, of counsel), for defendants-appellees-cross-appellant.

Appendix A

MANSFIELD, *Circuit Judge:*

The North American Soccer League (NASL) and certain of its member soccer teams (collectively referred to herein as "the NASL") appeal from a judgment of the Southern District of New York, Charles S. Haight, Jr., *Judge,* dissolving a preliminary injunction and dismissing a complaint seeking a permanent injunction and treble damages for alleged violations of § 1 of the Sherman Act, 15 U.S.C. § 1, by the defendants, the National Football League ("NFL") and certain of its member football clubs (collectively referred to herein as "the NFL"). The NFL cross appeals from the dismissal of its counterclaim, which sought an injunction barring owners of NASL member teams from cross-ownership of NFL teams. Because the conduct complained of by the NASL—an NFL ban on cross-ownership by NFL members of other major professional sports league teams (the "cross-ownership ban")—violates the rule of reason under §1 of the Sherman Act, we reverse. We affirm the dismissal of the NFL's counterclaim.

The central question in this case is whether an agreement between members of one league of professional sports teams (NFL) to prohibit its members from making or retaining any capital investment in any member of another league of professional sports teams (in this case NASL) violates the antitrust laws. The answer requires an analysis of the facts and application of governing antitrust principles. Most of the facts are not in dispute. The NFL is an unincorporated joint venture consisting of 28 individually owned separate professional football teams, each operated through a distinct corporation or partnership, which is engaged in the business of providing public entertainment in the form of competitive football games between its member teams. It is the only major league professional football association in

Appendix A

the United States. Upon becoming a member of the NFL a team owner receives a non-assignable franchise giving him the exclusive right to operate an NFL professional football team in a designated home city and "home territory," and to play football games in that territory against other NFL members according to a schedule and terms arranged by the NFL.[1] See NFL Constitution and By-laws, §§ 3.4, 4.1, 4.2.

The success of professional football as a business depends on several factors. The ultimate goal is to attract as many people as possible to pay money to attend games between members and to induce advertisers to sponsor TV broadcasts of such games, which results in box-office receipts from sale of tickets and revenues derived from network advertising, all based on public interest in viewing games. If adequate revenues are received, a team will operate at a profit after payment of expenses, including players' salaries, stadium costs, referees, travel, maintenance and the like. Toward this goal there must be a number of separate football teams, each dispersed in a location having local public fans willing to buy tickets to games or view them on TV; a group of highly skilled players on each team who are reasonably well-matched in playing ability with those of other teams; adequate capital to support the teams' operations; uniform rules of competition governing game play; home territory stadia available for the conduct of the games; referees; and an apparatus for the negotiation and sale of network TV and radio broadcast rights and distribution of broadcast revenues among members.

---

[1] In a few cities the size of the population and fan interest have led the NFL to grant franchises to two teams on an equal basis in a home territory (e.g., San Francisco Forty Niners and the Oakland Raiders; the New York Giants and the New York Jets).

To perform these functions some sort of an economic joint venture is essential. No single owner could engage in professional football for profit without at least one other competing team. Separate owners for each team are desirable in order to convince the public of the honesty of the competition. Moreover, to succeed in the marketplace by attracting fans the teams must be close in the caliber of their playing ability. As one commentator puts it

> "there is a great deal of economic interdependence among the clubs comprising a league. They jointly produce a product which no one of them is capable of producing alone. In addition, the success of the overall venture depends upon the financial stablity of each club." *J. Weistart & C. Lowell, The Law of Sports* § 5.11, at 757-58 (1979).

Earlier in this century various professional football leagues existed, outstanding of which were the NFL and AFL (American Football League). In 1970 the AFL merged into the NFL, after receiving Congressional approval to avoid violation of antitrust laws that would otherwise occur.[2] Since then the NFL has assumed full responsibility for national promotion of professional football, granting of team franchises, negotiation of network TV contracts for broadcast rights with respect to its members' games, employment of referees, adoption of game rules, scheduling of season games between members leading up to the league championship game known as the Super Bowl, and many

---

[2] Although Congress has exempted from antitrust scrutiny the mergers of professional team sports leagues, 15 U.S.C. § 1291, it specifically provided, in adopting this exemption, that "[n]othing contained in this [exemption] shall be deemed to change, determine, or otherwise affect the applicability or nonapplicability of the antitrust laws" to such leagues, 15 U.S.C. § 1294.

other matters pertaining to the national sport. Although specific team profit figures were not introduced at trial, the record is clear that the NFL and most of its members now generally enjoy financial success. The NFL divides pooled TV receipts equally among members. Pre-season gate receipts from each game are shared on a 50/50 basis between opposing teams, and regular season gate receipts are divided on the basis of 60% for the home team and 40% for the visiting team.

Although NFL members thus participate jointly in many of the operations conducted by it on their behalf, each member is a separately owned, discrete legal entity which does not share its expenses, capital expenditures or profits with other members. Each also derives separate revenues from certain lesser sources, which are not shared with other members, including revenues from local TV and radio, parking and concessions. A member's gate receipts from its home games varies from those of other members, depending on the size of the home city, the popularity of professional football in the area and competition for spectators offered by other entertainment, including professional soccer. As a result, profits vary from team to team. Indeed as recently as 1978, the last year for which we have records, 2 of the 28 NFL teams suffered losses. In 1977 12 teams experienced losses.[3] Thus, in spite of sharing of some revenues, the financial performance of each team, while related to that of the others, does not, because of the variables in revenues and costs as between member teams, necessarily rise or fall with that of the others. The NFL teams are separate economic entities engaged in a joint venture.

[3] Judge Haight did not allow discovery of actual profit figures of NFL teams. The NFL provided an index of profitability for each team that shows how the team's profits have varied over time, but gives no indication of the absolute amount of profit or the profit relative to that of other teams.

Appendix A

The National American Soccer League ("NASL") was founded in 1968 upon the merger of two pre-existing soccer leagues. Like the NFL, the NASL is an unincorporated association of professional soccer teams whose members are separately owned and operated, and are financially independent. Its raison d'etre and the needs of its member teams are essentially the same as those of members of other major professional sports leagues, including the NFL. However, professional soccer is not as mature or lucrative as professional football. Just as was the case with NFL member teams a quarter of a century ago, NASL is struggling to achieve wider popularity and with it greater revenues. Consequently, the risk of investing in an NASL team is considerably greater than that of investing in the NFL.

Soccer was not a widely followed or popular sport when the NASL was founded, and several earlier attempts to put together a professional soccer league failed due to lack of fan interest. The NASL has been the most successful soccer league to date. The district court found that since the NASL was organized "professional soccer has experienced substantial and accelerated growth in fan interest, media following, paid attendance, number of franchises and geographic scope. . . ." 505 F.Supp. 659 at 666-67. With this success NASL teams have become increasingly more effective competitors of the NFL teams. The two sports are somewhat similar. Their seasons substantially overlap. The teams have franchises from their respective leagues in the same locations and frequently use the same stadia. An increasing, although small, percentage of the public are switching their interest as fans and TV viewers from professional football to professional soccer, threatening to reduce revenue which NFL teams derive from gate receipts and TV broadcast rights. Competition between NFL and NASL teams has not only

increased on an inter-league basis but also between individual NFL and NASL teams. On the league front both organizations compete for a greater share of finite national and regional TV broadcast and advertising revenues. At the local level NFL teams compete against NASL teams for greater fan support, gate attendance, and local broadcast revenues.

In spite of its success relative to other leagues that have attempted to make soccer a viable competitor, the NASL and its member teams have been, to this point, financially unsuccessful. Last year the teams collectively lost approximately $30 million. Individual NASL franchises have been very unstable; for example, since the trial of this case 8 of the 24 NASL teams have folded. Thus the NASL is the weakest of the major professional sports leagues (the NFL, the NASL, the National Basketball Association, the National Hockey League, and Major League Baseball).

Because of the interdependence of professional sports league members and the unique nature of their business, the market for and availability of capital investment is limited. As the district court found, the economic success of each franchise is dependent on the quality of sports competition throughout the league and the economic strength and stability of other league members. Damage to or losses by any league member can adversely affect the stability, success and operations of other members. Aside from willingness to take the risk of investing in a member of a league in which members have for the most part not demonstrated a record of profits, the potential investor must be reasonably compatible with other members of the league, with a sufficient understanding of the nature of the business and the interdependence of ownership to support not only his newly-acquired team but the sports league of which it is a member.

As the district court further noted, these conditions have tended to attract individuals or businesses with distinct characteristics as distinguished from the much larger number of financiers of the type prevailing in most business markets. Although, as the district court observed, the boundaries of this "sports ownership capital and skill" market are not as confined as NASL contends and not limited strictly to present major league sports owners, the sources of sports capital are limited by the foregoing conditions and existing sports league owners constitute a significant source. In short, while capital may be fungible in other businesses, it is not fungible in the business of producing major league professional sports. Regardless of the risk involved in the venture, which may vary greatly from league to league, league members look not merely for money but for a compatible fellow owner, preferably having entrepreneurial sports skill, with whom the other members can operate their joint business enterprise. League members recognize, for example, that if the owner of one team allowed it to deteriorate to the point where it usually lost every game, attendance at games in which that team was playing would fall precipitously, hurting not just that team, but every other team that played it during the season. In view of this business interdependence team owners, through their leagues, are careful about whom they allow to purchase a team in their league and leagues invariably require that the sale of a franchise be approved by a majority of team owners rather than by the selling owner alone.

For these reasons individuals with experience in owning and operating sports teams tend to be the most sought-after potential owners. Indeed, the NFL made clear that it values proven experience in a potential owner. When in 1974 it expanded by 2 teams, 5 of the 8 prospective owners it considered seriously had professional sports team ownership

experience; a sixth had experience in non-team sports. The two ownership groups to whom it awarded franchises included individuals with prior professional sports team ownership experience, and the NFL did not award the franchises to the highest bidder, a procedure that would have provided the most *immediate* financial reward to its owners.

The attractiveness of existing owners of major sports teams as sources of potential capital is further evidenced by the large number of members of major sports leagues who control or own substantial interests in members of other leagues. The record reveals some 110 instances of cross-ownership and some 238 individuals or corporations having a 10% or greater interest in other teams. Over the last 13 years there have been 16 cross-ownerships between NFL and NASL teams. Indeed, since the NASL was organized Lamar Hunt, the owner of the NFL's Kansas City Chiefs, has been involved as an NASL team owner, first of the Dallas Tornado team, then of the Tampa Bay team, and as a promoter of NASL. Since 1975 Elizabeth Robbie, the wife of the NFL's Miami Dolphins owner Joseph Robbie, has been the majority owner of the NASL's Fort Lauderdale franchise. Mr. Robbie has apparently been the actual operator of the soccer team as well as the football team. In the words of the district court, these cross-owners have provided the NASL with an "important element of stability," 465 F.Supp. 665 at 669, which led to professional soccer's becoming a major league sport, and withdrawal of their interests "would have a significantly adverse effect on the NASL," 505 F.Supp. at 668.[4]

---

[4] In addition to the Hunt and Robbie cross-ownerships Bill Bidwill had a controlling interest in the NFL St. Louis Cardinals and a 3% interest in the NASL California Surf. Earlier cross-ownership by beneficial owners of the NFL Seattle Seahawks of interests in the NASL Seattle Sounders was terminated.

Appendix A

Beginning in the 1950's NFL commissioners had a policy against a team owner maintaining a controlling interest in a team of a competing league, which was first put in writing by the owners themselves in January 1967, at a time when 12 owners of old NFL or AFL teams (the leagues had by then agreed to merge to form the present NFL) were involved in the formation of the predecessors of the NASL. The resolution, which was approved at an owners' meeting, called for the drafting of amendments to the NFL constitution and by-laws prohibiting cross-ownership, but nothing was ever done to comply with it. In 1972 the NFL owners passed another resolution providing that NFL owners were not to acquire operating control of a team in a competing league. The participants agreed that any member holding such a controlling interest would make a "best effort" to dispose of it.

For the next five years the NFL members repeatedly passed the same resolution at meetings, except through inadvertence in 1975. During this period the NASL, which had come close to disbanding in 1968, grew more successful, due in no small part to the efforts of Hunt, who worked tirelessly to promote professional soccer and raise capital for it. NFL owners began to feel competition from the NASL. Leonard Tose, the owner of the Philadelphia Eagles, became one of the most vocal opponents of Hunt's soccer holdings. At approximately the same time the NASL Philadelphia Atoms were leading that league in attendance, and Tose's NFL football team, the Philadelphia Eagles, was losing money. (The Eagles lost money from at least 1969 to 1974, and in 1976 and 1977.) Tose became particularly incensed when Hunt began doing promotional work for the NASL. For example, at one NFL owners' meeting Tose denounced Hunt for allegedly stating in an interview that

soccer is the sport of the future. Tose later explained one of the reasons for his concern, stating, "in my view when our truck drivers [fans] have X number of dollars to spend for entertainment in sport, and [sic] any dollar that they spend in another sport could affect what they spend for football." In short, Mr. Tose's business, the NFL Philadelphia Eagles, was suffering from the competition from the NASL Philadelphia Atoms.

Tose was not the only NFL owner upset by competition from a soccer league team. Max Winter, the owner of the NFL's Minnesota Vikings, became concerned about competition from the Minnesota Kicks, an NASL member. As Tose had done, Winter complained about Hunt's NASL soccer team interest at NFL owners' meetings. At his deposition he stated, "I think I said it to the league, in the room, that I object very much that an American Football Conference President [i.e., Hunt] is going to Minneapolis to advance soccer, introduce soccer in my city." Winter discussed Hunt's activities with Tose, stating that he felt that the Kicks "are hurting us, the sports dollar, that they are drawing very well, that we are losing ground as far as media exposure, fan participation. [It g]enerally hurts us."

Finally in 1978 the NFL owners moved to take strong action against Hunt and Robbie. An amendment to the NFL by-laws was proposed that would require both to divest their soccer holdings if they wished to continue to own an NFL team. The proposed amendment, which was to have been voted on at an October 1978 NFL owners' meeting, would also have prevented all majority owners, certain minority owners, officers and directors of NFL teams, and certain relatives of such persons from owning any interest in a team in a "major team sport." The proposal was to amend Article IX of the NFL Constitution and By-laws by adding a new Section 9.4 as follows:

"9.4(A) No person (1) owning a majority interest in a member club, or (2) directly or indirectly having substantial operating control, or substantial influence over the operations, of a member club, or (3) serving as an officer or director of a member club, nor (4) any spouse or minor child of any such person, may directly or indirectly acquire, retain, or possess any interest in another major team sport (including major league baseball, basketball, hockey and soccer).

"(B) The prohibition set forth in subsection (A) hereof shall also apply to relatives of such persons (including siblings, parents, adult children, adult and minor grand children, nephews and nieces, and relatives by marriage) (1) if such person directly or indirectly provided or contributed all or any part of the funds used to purchase or operate the other sports league entity, or (2) if there exists between such person and any such relative a significant community of interest in the successful operation of the other sports league entity.

"(C) The Commissioner shall investigate, to the extent he deems necessary or appropriate, any reported or apparent violation of this Section and shall report his findings to the Executive Committee prior to imposition of disciplinary action by the Committee.

"(D) Beginning on February 1, 1980, any person who, after notice and hearing by the Executive Committee, is found to have violated subsection (A) or (B) above will be subject to fines of up to $25,000 per month for each of the first three months of violations; up to $50,000 per month for each of

the next three months; and up to $75,000 per month thereafter. In addition, violations of more than six months' duration may be dealt with by the Executive Committee pursuant to Article VIII, Section 8.13(B).

"(E) If such person does not pay such fine to the League Treasurer within 20 days of its assessment, the unpaid amount thereof may be withheld, in whole or in part, by the Commissioner from available funds in possession of the League Office belonging to the member club with which the person in violation is affiliated."

As the district court found, the cross-ownership ban "has a concededly anticompetitive intent and, in its impact on the NASL, will probably have an anticompetitive effect." 505 F.Supp. at 689. The purpose of the ban was to weaken the NASL and its member teams so that they could not compete as effectively against the stronger, more mature, and lucrative NFL teams as they might be able to do with the aid of capital investment by NFL team owners.

On September 28, 1978, the NASL and various of its members commenced this action by serving the NFL with a complaint and an order to show cause why it should not be preliminarily enjoined from adopting the proposed amendment. On February 21, 1979, after hearing oral argument, Judge Haight issued a preliminary injunction prohibiting the enactment of the amendment. The judge found that the NASL would be irreparably injured if the NFL were allowed to adopt the amendment, that there were serious questions going to the merits, and that the balance of the hardships tipped in favor of the NASL. 465 F.Supp. 665. The NFL did not appeal the injunction.

A lengthy trial followed, and on November 17, 1980, Judge Haight issued his decision. 505 F.Supp. 659. Although he found that the purpose and impact of the NFL cross-ownership ban was to suppress competition in interstate commerce on the part of NASL and its members, he denied relief on the ground that in competing against NASL and its members the NFL and its members must be regarded as a "single economic entity," rendering § 1 of the Sherman Act inapplicable for the reason that it is limited to a plurality of actors. Recognizing that individual NFL teams compete with individual NASL teams for the consumer's dollar in their respective localities, the district court nevertheless concluded that this NFL team-member versus NASL team-member competition is subsumed in league versus league competition in the general entertainment market, which he described as "the primary economic competition in professonal sports," 505 F.Supp. at 678, stating that in all relevant markets the competition is "between two single economic entities uncomplicated by any relevant competition between the member clubs of a league," *id.* at 685. Decisions rejecting sports leagues' contentions that they should be treated as "single economic entities" were distinguished on the ground that they involved different types of markets in which the members of a sports league were competing individually against each other (e.g., for players' services, hiring availabilty and terms, reserve clauses, college drafts, etc.), whereas here the court considered them to act monolithically as one joint enterprise. Supreme Court decisions in non-sports antitrust cases rejecting arguments that business trade restraints were justified on the ground that two or more participants had acted as a joint venture or "single business entity," e.g., *Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951),

and *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968), were distinguished on the ground those combinations, unlike sports leagues, were unnecessary to the successful production and marketing of the product involved, the district judge here stating, "No interdependence or joint action is necessary to make a bearing or a muffler." 505 F.Supp. at 686. Because individual teams acting alone could not produce "Pro Football," Judge Haight reasoned, the combination of those teams through the NFL was justified by its "dominant purpose," the production of the league sport, and was legal under *Timken* and *Perma Life*. For the same reason the judge refused to apply the rule of reason as articulated in *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978).

Judge Haight further concluded that, while a sports ownership capital market may exist as a submarket of the broad capital funds market, the NASL and its members had failed to prove that the submarket was, as claimed by them, limited to present owners of major sports league teams. He declined to make any finding as to the scope of the submarket and whether the NFL cross-ownership ban foreclosed NASL teams from access to any significant share of it or restrained them from competing against NFL teams in the entertainment market. Instead he chose to rest his decision on the "single economic entity" theory.

NFL's two counterclaims were both rejected as without substance. With respect to the first counterclaim, which sought an injunction prohibiting the NASL and its member teams from engaging in cross-ownership with the NFL on the ground that such activity was analogous to interlocking directorates linking horizontal competitors, the judge ruled

that the NFL had not shown any threat of injury from the alleged violation and, assuming that it had proved a threat of injury, an injunction would be mere surplusage because the NFL had the power to end cross-ownership itself.

DISCUSSION

The first issue is whether § 1 of the Sherman Act, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . ." applies to the cross-ownership ban adopted by NFL and its members. The NFL contends, and the district court held, that § 1 does not apply for the reason that the NFL acted as a "single economic entity" and not as a combination or conspiracy within the meaning of that law. We disagree. As the Supreme Court long ago recognized, the Sherman Act by its terms applies to "*every*" combination or agreement concerning trade, not just certain types. *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918). The theory that a combination of actors can gain exemption from § 1 of the Sherman Act by acting as a "joint venture" has repeatedly been rejected by the Supreme Court and the Sherman Act has been held applicable to professional sports teams by numerous lesser federal courts. See, e.g., *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42, 88 S.Ct. 1981, 1985-86, 20 L.Ed.2d 98 (1968); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 598, 71 S.Ct. 971, 974, 95 L.Ed. 1199 (1951); *Radovich* v. *National Football League*, 352 U.S. 445, 449-52, 77 S.Ct. 390, 392-94, 1 L.Ed.2d 456 (1957); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246,

10 L.Ed.2d 389 (1963); *Associated Press* v. *United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945); *Linseman* v. *World Hockey Association*, 439 F.Supp. 1315 (D. Conn.1977); *Robertson* v. *National Basketball Association*, 389 F.Supp. 867 (S.D.N.Y.1975); *Philadelphia World Hockey Club Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F.Supp. 462 (E.D.Pa.1972); *Smith* v. *Pro-Football, Inc.*, 593 F.2d 1173 (D.C.Cir.1978); *Mackey* v. *NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. denied*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977); *Los Angeles Memorial Coliseum Commission* v. *NFL* ("*Coliseum II*"), 484 F. Supp. 1274 (C.D.Cal.), *rev'd on other grounds*, 634 F.2d 1197 (9th Cir. 1980); *Los Angeles Memorial Coliseum* v. *NFL* ("*Coliseum I*"), 468 F.Supp. 154, 164 (C.D.Cal. 1979); *Bowman* v. *NFL*, 402 F.Supp. 754 (D.Minn.1975); *Kapp* v. *NFL*, 390 F.Supp. 73 (N.D.Cal.1974), *appeal vacated*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979). Cf. *San Francisco Seals Ltd.* v. *National Hockey League*, 379 F. Supp. 966 (C.D.Cal.1974); *Levin* v. *National Basketball Association*, 385 F.Supp. 149 (S.D.N.Y. 1974). We are unpersuaded by the efforts of the district judge to distinguish these cases from the present one. Although many involved player relations or playing sites which affect competition between member teams, at least one raised issues between leagues. In *Radovich* v. *National Football League*, *supra*, the issue was whether an NFL boycott of a player who had previously accepted employment with a competing pro-football league, the All American Conference, violated § 1 of the Sherman Act. The Court held in *Radovich* that it did, even though that boycott might not, in the words of the district court, "implicate [or] impinge[ ] upon competition between member clubs." 505 F.Supp. at 677.

Appendix A

The characterization of NFL as a single economic entity does not exempt from the Sherman Act an agreement between its members to restrain competition. To tolerate such a loophole would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects. Moreover, the restraint might be one adopted more for the protection of individual league members from competition than to help the league. For instance, the cross-ownership ban in the present case is not aimed merely at protecting the NFL as a league or "single economic entity" from competition from the NASL as a league. Its objective also is to shield certain individual NFL member teams as discrete economic entities from competition in their respective home territories on the part of individual NASL teams that are gaining economic strength in those localities, threatening the revenues of such individual teams as the NFL Philadelphia Eagles, owned by Leonard Tose, because of competition by the NASL's Philadelphia team, and the revenues of the NFL Minnesotta Vikings because of competition by the successful NASL Minnesotta Kicks. The NFL members have combined to protect and restrain not only leagues but individual teams. The sound and more just procedure is to judge the legality of such restraints according to well-recognized standards of our antitrust laws rather than permit their exemption on the ground that since they in some measure strengthen the league competitively as a "single economic entity," the combination's anticompetitive effects must be disregarded.[5]

[5] Even if the NFL were a single firm, that fact would not immunize from § 1 scrutiny the restraint involved here. Vertical agreements

(footnote continued on following page)

Having concluded that § 1 of the Sherman Act is applicable, we next must decide whether the NFL teams' cross-ownership ban violates that statute. The plaintiffs, characterizing the ban as a "group boycott" and "concerted refusal to deal," contend that the conduct is a species of the patently pernicious anticompetitive kind that must be condemned as *per se* unlawful without further proof. See, *e.g.*, *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940) (agreements between horizontal competitors to maintain price of their product); *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972) (allocation of market territories between horizontal competitors); *United States* v. *General Motors Corp.*, 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966) (conspiracy between manufacturers and distributors to eliminate price competition by discounters); *Klor's, Inc.* v. *Broadway-Hale Store, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959) (agreement between 10 competing national manufacturers and their distributors not to sell products to petitioner or to sell only at discriminatory prices and unfavorable terms); *United States* v. *Koppers Company, Inc.*, 652 F.2d 290 (2d Cir. 1981) (agreement between competitors to rig bids and allocate market territories). We disagree.

Combinations or agreements are *per se* violations of the Sherman Act only if they are so "plainly anticompetitive," *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692, 98 S.Ct. 1355, 1365, 55 L.Ed2d 637

(footnote continued from preceding page)

between a corporation and its distributors are subject to the rule of reason, *Continental TV, Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), and we see no reason why an agreement between a corporation and its owners (as the NFL team owners would be under this assumption) should be treated differently.

(1978), and so lacking in any "redeeming virtue," *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958), that "because of [their] unquestionably anticompetitive effects," *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 440, 98 S.Ct. 2864, 2875, 57 L.Ed.2d 854 (1978), "they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases," *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 8, 99 S.Ct. 1551, 1556, 60 L.Ed.2d 1 (1979). Examples are agreements between competitors fixing prices at which they will sell their competing products, limiting their respective marketing areas, or restricting customers to whom their products will be sold or from whom they will be purchased. The cross-ownership ban, though anticompetitive, does not meet these stringent conditions. Although competition exists between NFL members in various respects (e.g., on the playing fields, for players' services and for fans within a home territory where two or more teams are franchised), that competition is not restrained by the cross-ownership ban. Indeed, it is irrelevant to that ban, which is designed to restrain competition by NASL teams *against* NFL teams, *not* competition *between* NFL teams. Bearing in mind the Supreme Court's admonition in *Continental TV, Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49-50, 97 S.Ct. 2549, 2557, 53 L.Ed2d 568 (1977), that "[*p*]*er se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive," we are not prepared, by using "the tyranny of tags and tickets," Cardozo, *Mr. Justice Holmes*, 44 Harv.L.Rev. 682, 688 (1931), to label league cross-ownership bans automatically unlawful regardless of their effects. As the arguments advanced by the NFL indicate, circumstances could exist that might justify

a ban by a weak league as necessary to protect it against serious competitive harm by a cross-owner who threatened to misuse his position in that league to favor a stronger competing league and its members. Under those circumstances a ban "might survive scrutiny under the Rule of Reason even though [it] would be viewed as a violation of the Sherman Act in another context," *National Society of Professional Engineers* v. *United States, supra,* 435 U.S. at 686, 98 S.Ct. at 1362.

Because agreements between members of a joint venture can under some circumstances have legitimate purposes as well as anticompetitive effects, they are subject to scrutiny under the rules of reason. *Standard Oil Co.* v. *United States,* 221 U.S. 1, 31, S.Ct. 502, 55 L.Ed. 619 (1911); *United States* v. *Addyston Pipe & Steel Co.,* 85 Fed. 271 (6th Cir. 1898). This entails an inquiry into "whether the challenged agreement is one that promotes competition or one that suppresses competition," *National Society of Professional Engineers* v. *United States, supra,* 435 U.S. at 691, 98 S.Ct., at 1365, that is, whether the procompetitive effects of this restraint outweigh the anticompetitive effects. As we stated in *Eiberger* v. *Sony Corp. of America,* 622 F.2d 1068, 1076 (2d Cir. 1980) (quoting *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918)),

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its conditions before and after the restraint was imposed; the nature of the

> restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

Finally, in carrying out a rule of reason analysis, "the existence of [less restrictive] alternatives is obviously of vital concern in evaluating putatively anticompetitive conduct." *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 303 (2d Cir. 1979).

In this case, the procompetitive effect claimed by the defendants for the cross-ownership ban is that the ban is necessary for the NFL owners to compete efficiently in the professional sports league market. On the other hand, the voluminous trial record discloses that the NFL's cross-ownership ban would foreclose NASL's teams from continued enjoyment of and access to a significant segment of the market supply of sports capital and skill, thereby restraining at least some NASL teams from competing effectively against NFL teams for fan support and TV revenues. Any resulting restraint would benefit not merely the NFL as a league but those NFL teams that would be otherwise weakened individually and disproportionally (as compared with other NFL teams) by competing NASL teams. This evidence of the defendants' anticompetitive purpose is relevant in judging its potential anticompetitive effect. *Eiberger* v. *Sony Corp. of America*, 622 F.2d 1068, 1076 (2d Cir. 1980) quoting *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918)). *Accord, National Society of Pro-*

fessional Engineers v. *United States*, 435 U.S. 679, 692, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978).

NFL argues that there is no such thing as a limited market or submarket for sports capital and skill, only a general market in which "capital is fungible." It further urges that in this much larger market the effect of the cross-ownership ban would be *de minimis*, working no appreciable anticompetitive restraint on NASL teams, and that their difficulty in attracting capital is attributable to the poor financial outlook of their franchises rather than to the ban.[6] Judge Haight, while noting the weakness of the NASL teams' financial condition and prospects, made no definite finding regarding the existence or scope of a sports capital market other than to state that it was not, as NASL contended, limited to existing or potential major sports team owners, a finding with which we need not disagree. Simultaneously he rejected the NFL's contention as to the scope of the relevant capital market, stating,

> "I reject the extremes of both the Guth [NASL] and Caputo [NFL] perceptions. Individuals and corporations alike have identifiable characteristics which incline them toward sports ownership. Findings Nos. 17-18. The absence of such characteristics, in an individual or corporation, effectively removes them from the *sports* capital market, thereby shrinking the worldwide boundaries envisioned by Caputo. But there is no basis, in logic or law, for restricting the boundaries of that submarket, as would Guth, to individuals who are presently controlling owners of a major league team. That nar-

[6] The NFL claims that no special skills are required to run a major league sports team.

> row perception disregards significant, interchangeable sources of sports capital: individuals who are not presently controlling sports owners; and corporations." 505 F.Supp. at 682.

Since NASL had failed to prove its concept of a narrow sports capital market, the district court declined to make more specific findings other than to indicate that a sports capital market does exist, which is not as small as urged by NASL nor as large as contended by NFL. He concluded that it was unnecessary for him to define the scope of the sports capital market because "if competition does exist in such a submarket, it is, again, competition between two single economic entities," 505 F.Supp. at 684.

Since we have rejected the "single economic theory" in the context of this case, it is necessary to determine whether the record discloses a separate market for sports capital and skill. We are satisfied that it does. As the Supreme Court noted in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 1524, 8 L.Ed.2d 510 (1962):

> The boundaries of . . . a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."

Because of the economic interdependence of major league team owners and the requirement that any sale be approved by a majority of the league members, an owner may in practice sell his franchise only to a relatively narrow group

of eligible purchasers, not to any financier.[7] The potential investor must measure up to a profile having certain characteristics. Moreover, on the supply side of the sports capital market the number of investors willing to purchase an interest in a franchise is sharply limited by the high risk, the need for active involvement in management, the significant exposure to publicity that may turn out to be negative, and the dependence on the drawing power and financial success of the other members of the league. The record thus reveals a market which, while not limited to existing or potential major sports team owners, is relatively limited in scope and is only a small fraction of the total capital funds market. The evidence further reveals that in this sports capital and skill market owners of major professional sports teams constitute a significant portion. Indeed the existence of such a submarket and the importance of the function of existing team owners as sources of capital in that market are implicitly recognized by the defendants' proven intent in adopting the cross-ownership ban. If they believed, as NFL now argues, that all sources of capital were fungible substitutes for investment in NASL sports teams and that the ban would not significantly foreclose the supply of sports capital, they would hardly have gone to the trouble of adopting it. Unless the ban has procompetitive effects outweighing its

---

[7] For example, Steve Rosenbloom, the son of the former owner of the NFL's Baltimore Colts, said of the family's experience in attempting to sell the Colts:

> "As I say from experience, it is a small market, because it was no secret we might have sold the thing and that we were talking to people. A few people came around, and those that came around never came up with any concrete proposal. I would take that experience and say, theoretically or practically, or realistically, there didn't seem to be a large market for it."

clear restraint on competition, therefore, it is prohibited by § 1 of the Sherman Act. That law does not require proof of the precise boundaries of the sports capital market or the exact percentage foreclosed; it is sufficient to establish, as was done here, the general outlines of a separate submarket of the capital market and that the foreclosed portion of it was likely to be significant.

NFL argues that the anticompetitive effects of the ban would be outweighed by various procompetitive effects. First it contends that the ban assures it of the undivided loyalty of its team owners in competing effectively against the NASL in the sale of tickets and broadcasting rights, and that cross-ownership might lead NFL cross-owners to soften their demands in favor of their NASL team interests. We do not question the importance of obtaining the loyalty of partners in promoting a common business venture, even if this may have some anticompetitive effect. But in the undisputed circumstances here the enormous financial success of the NFL league despite long-existing cross-ownership by some members of NASL teams demonstrates that there is no market necessity or threat of disloyalty by cross-owners which would justify the ban. Moreover, the NFL was required to come forward with proof that any legitimate purposes could not be achieved through less restrictive means. This it has failed to do. The NFL, for instance, has shown no reason why it could not remedy any conflict of interest arising out of NFL-NASL competition for broadcast rights by removing cross-owners from its broadcast rights negotiating committee.

For the same reasons we reject the NFL's argument that the ban is necessary to prevent disclosure by NFL cross-owners of confidential information to NASL competitors. No evidence of the type of information characterized as

"confidential" is supplied. Nor is there any showing that the NFL could not be protected against unauthorized disclosure by less restrictive means. Indeed, despite the existence of NFL cross-owners for some years there is no evidnce that they have abused confidentiality or that the NFL has found it necessary to adopt confidentiality rules or sanctions. Similarly, there is no evidence that cross-ownership has subjected the personnel and resources of NFL cross-owners to conflicting or excessive demands. On the contrary, successful NFL team owners have been involved in ownership and operation of other outside businesses despite their equal potential for demands on the owners' time and resources. Moreover, a ban on cross-ownership would not insure that NFL team owners would devote any greater level of their resources to team operations than they otherwise would.

Although there may be some merit in NFL's contentions that the ban would prevent dilution of the good will it has developed, that it would avoid any disruption of NFL operations because of disputes between its owners or cross-owners, or that it would prevent possible inter-league collusion in violation of the antitrust laws, these procompetitive effects are not substantial and are clearly outweighed by its anticompetitive purpose and effect. Its net effect is substantially to restrain competition, not merely competitors. It therefore violates the rule of reason. See *McClain* v. *Real Estate Board*, 444 U.S. 232, 243, 100 S.Ct. 502, 509, 62 L.Ed.2d 441 (1980); *Oreck Corp.* v. *Whirlpool Corp.*, 579 F.2d 126, 129 n.4, 132 n.6 (2d Cir.) (*en banc*), *cert. denied*, 439 U.S. 946, 99 S.Ct. 340, 58 L.Ed.2d 338 (1978).

In view of our holding with respect to plaintiffs' claims against NFL, the latter's counterclaim deserves little com-

ment. It amounts to little more than a meritless makeweight. The claim that cross-ownership violates § 1 of the Sherman Act because it is analogous to an interlocking directorate of the type prohibited by § 8 of the Clayton Act, 15 U.S.C. § 19, is wholly unsupported in fact and in law. Absent proof that the leagues are corporate or separate entities with directors, which they are not, § 8 has no application. Moreover, in the absence of evidence that cross-ownership restrains or threatens competition between the two leagues or their member teams, the mere common ownership of some teams and membership of some owners on league committees do not constitute a violation of the antitrust laws. On the contrary, there is evidence of record that cross-ownership, by strengthening some NASL teams, has increased their competition against NFL teams. In any event, as the district court observed, NFL has not offered any evidence that it has suffered or faces a significant threat of injury by reason of cross-ownership, which is essential to the issuance of the injunctive relief requested.

We reverse the order granting judgment of the NFL and remand with directions to enter a permanent injunction prohibiting the ban. Because the district court's decision made it unnecessary for it to consider the issue of damages, we remand for consideration of that issue. We affirm the dismissal of NFL's counterclaim requesting an injunction against cross-ownership.

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 4560-CSH

NORTH AMERICAN SOCCER LEAGUE, *et al.*,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE, *et al.*,

Defendants.

WEIL, GOTSHAL & MANGES, New York City, for plaintiffs; Ira M. Millstein, James W. Quinn, Irwin H. Warren, Jeffrey L. Kessler, Kenneth L. Steinthal, New York City, of counsel.

SULLIVAN & CROMWELL, New York City, for The National Football League and Certain NFL Teams; William E. Willis, James H. Carter, Jr., Howard D. Burnett, New York City, of counsel.

MEMORANDUM OPINION AND ORDER

Haight, District Judge:

INTRODUCTION

This is a private antitrust suit, tried to the Court without a jury. Plaintiff North American Soccer League (the "NASL") is an unincorporated association of 24 profes-

sional soccer clubs located throughout the United States and Canada. The other plaintiffs are 21 of those 24 member organizations. Defendant National Football League (the "NFL") is an unincorporated association of 28 professional football clubs located throughout the United States. The other defendants are 25 of those 28 member organizations.

In October, 1978, the NFL scheduled a meeting to vote upon a proposed amendment to its by-laws which reads as follows:

> "Amend Article IX, by adding a new Section 9.4 as follows:
> "9.4(A) No person (1) owning a majority interest in a member club, or (2) directly or indirectly having substantial operational control, or substantial influence over the operations, of a member club, or (3) serving as an officer or director of a member club, nor (4) any spouse or minor child of any such person, may directly or indirectly acquire, retain, or possess any interest in another major team sport (including major league baseball, basketball, hockey and soccer).
> "(B) The prohibition set forth in subsection (A) hereof shall also apply to relatives of such persons (including siblings, parents, adult children, adult and minor grand children, nephews and nieces, and relatives by marriage) (1) if such person directly or indirectly provided or contributed all or any part of the funds used to purchase or operate the other sports league entity, or (2) if there exists between such person and any such relative a significant community of interest in the successful operation of the other sports league entity.

"(C) The Commissioner shall investigate, to the extent he deems necessary or appropriate, any reported or apparent violation of this Section and shall report his findings to the Executive Committee prior to imposition of disciplinary action by the Committee.

"(D) Beginning on February 1, 1980, any person who, after notice and hearing by the Executive Committee, is found to have violated subsection (A) or (B) above will be subject to fines of up to $25,000 per month for each of the first three months of violations; up to $50,000 per month for each of the next three months; and up to $75,000 per month thereafter. In addition, violations of more than six months' duration may be dealt with by the Executive Committee pursuant to Article VIII, Section 8.13(B).

"(E) If such person does not pay such fine to the League Treasurer within 20 days of its assessment, the unpaid amount thereof may be withheld, in whole or in part, by the Commissioner from available funds in possession of the League Office belonging to the member club with which the person in violation is affiliated."

This proposed by-law will hereafter be referred to as the "cross-ownership ban."

Plaintiffs allege that the cross-ownership ban, if enacted by defendants, would violate Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. Their complaint, invoking Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, sought to preliminarily and permanently enjoin implementation of the by-law. Plaintiffs also prayed for a declaratory judgment pursuant to 28 U.S.C. § 2201, declaring the proposed cross-ownership ban, together with other actual and threatened conduct by defendants, violative of the

Sherman Act, and for treble damages. Jurisdiction lay under 28 U.S.C. §§ 1331 and 1337, and venue under 28 U.S.C. § 1391 and 15 U.S.C. §§ 15 and 22.

Defendants denied the allegations of the complaint, and asserted two counterclaims against plaintiffs, alleging Sherman Act violations on their part.

At the outset I granted plaintiffs a preliminary injunction, restraining defendants from enacting the proposed by-law or otherwise implementing the cross-ownership ban. 465 F.Supp. 665. The case then preceeded through discovery, preparation of a joint pre-trial order, and trial. I wish particularly to compliment counsel for both sides for meticulous preparation and able advocacy.

I now enter the following Findings of Fact, Discussion, and Conclusions of Law. Rule 52(a), F.R.Civ.P.

FINDINGS OF FACT

These findings adopt, in substantial measure, the helpful statement of agreed facts prepared by the parties in connection with the pre-trial order.

I.

THE PARTIES

No. 1: Plaintiff North American Soccer League (the "NASL") is an unincorporated association of twenty-four (24) professional soccer clubs located throughout the United States and Canada.

No. 2: The NASL was organized in 1968 upon the merger of two predecessor soccer leagues for the purpose of promoting major league professional soccer in North America and is engaged in interstate commerce in the business of operating a professional soccer league.

Appendix B

No. 3: The other plaintiffs (or their successors) are 21 of the NASL member organizations (each of which is a corporation except where noted) which, at the time suit was filed, owned and operated professional soccer clubs for profit under the names and in the cities set forth below:

Plaintiff Team Owner	State or Province of Organization or Incorporation	Club Name (City)
Orange County Pro Soccer (limited partnership)	California, U.S.A.	California Surf (Anaheim)
Chicago-World Soccer, Inc.	Illinois, U.S.A.	Chicago Sting
Atlanta Professional Soccer, Ltd. (limited partnership)	Georgia, U.S.A.	Atlanta Chiefs
Michigan Soccer Limited (limited partnership)	Michigan, U.S.A.	Detroit Express
Houston Professional Soccer Club, Inc.	Texas, U.S.A.	Houston Hurricane
Aztecs Professional Soccer Club (limited partnership)	California, U.S.A.	Los Angeles Aztecs
Memphis Rogues, Ltd. (limited partnership)	Tennessee, U.S.A.	Memphis Rogues
Minnesota Soccer, Inc.	Minnesota, U.S.A.	Minnesota Kicks (Minneapolis)
Lipton Professional Soccer, Inc.	Delaware, U.S.A.	New England Tea Men (Boston)
Cosmos Soccer Club, Inc.	New York, U.S.A.	New York Cosmos
Edmonton NASL Soccer Enterprises, Ltd. (limited company)	Alberta, Canada	Edmonton Drillers
Philadelphia Soccer Associates (limited partnership)	Pennsylvania, U.S.A.	Philadelphia Fury
Louisiana-Pacific Corporation	Delaware, U.S.A.	Portland Timbers

Appendix B

Plaintiff Team Owner	State or Province of Organization or Incorporation	Club Name (City)
Blue & Gold Limited	New York, U.S.A.	Rochester Lancers
San Diego Professional Soccer Club, Inc.	California, U.S.A.	San Diego Sockers
San Jose Earthquakes Limited (limited partnership)	California, U.S.A.	San Jose Earthquakes
Tampa Bay Soccer Club, Inc.	Florida, U.S.A.	Tampa Bay Rowdies
Prosoccer Limited (limited company)	Ontario, Canada	Toronto Blizzard
Tulsa Roughnecks, Ltd. (limited partnership)	Oklahoma, U.S.A.	Tulsa Roughnecks
Vancouver Professional Soccer Club, Ltd. (limited company)	British Columbia, Canada	Vancouver Whitecaps
MSG Soccer, Inc.	New York, U.S.A.	Washington Diplomats

The NASL and these NASL member clubs are hereinafter referred to collectively as the NASL plaintiffs (while this opinion was in preparation, the Philadelphia Fury was sold to Molson Breweries of Montreal, and the Philadelphia NASL franchise transferred to the latter city).

No. 4: Defendant National Football League (the "NFL") is an unincorporated association of 28 professional football teams which is engaged in interstate commerce in the business of operating a major professional football league in the United States.

No. 5: The other defendants are 25 of the NFL member organizations (each of which is a corporation except where noted) which own and operate professional football clubs for profit under the club names and in the cities set forth below:

Appendix B

Defendant Team Owner	State of Organization or Incorporation	Club Name (City)
The Five Smiths, Inc.	Georgia	Atlanta Falcons
Baltimore Football Club, Inc.	Illinois	Baltimore Colts
Buffalo Bills, Inc.	New York	Buffalo Bills
Chicago Bears Football Club, Inc.	Illinois	Chicago Bears
Cincinnati Bengals, Inc.	Ohio	Cincinnati Bengals
Cleveland Browns, Inc.	Delaware	Cleveland Browns
Dallas Cowboys Football Club, Inc.	Texas	Dallas Cowboys
Rocky Mountain Empire Sports, Inc.	Colorado	Denver Broncos
The Detroit Lions, Inc.	Michigan	Detroit Lions
Green Bay Packers, Inc.	Wisconsin	Green Bay Packers
Houston Oilers, Inc.	Texas	Houston Oilers
Los Angeles Rams Football Company	Maryland	Los Angeles Rams
Minnesota Vikings Football Club, Inc.	Minnesota	Minnesota Vikings (Minneapolis)
New England Patriots Football Club, Inc.	Massachusetts	New England Patriots (Boston)
New Orleans Saints Louisiana Partnership (partnership)	Louisiana	New Orleans Saints
New York Football Giants, Inc.	New York	New York Giants
New York Jets Football Club, Inc.	Delaware	New York Jets
Oakland Raiders, Ltd. (limited partnership)	California	Oakland Raiders
The Philadelphia Eagles Football Club (limited partnership)	Pennsylvania	Philadelphia Eagles
Pittsburgh Steelers Sports, Inc.	Pennsylvania	Pittsburgh Steelers

Appendix B

Defendant Team Owner	State of Organization or Incorporation	Club Name (City)
St. Louis Cardinals Football Co.	Missouri	St. Louis Cardinals
Chargers Football Company (limited partnership)	California	San Diego Chargers
San Francisco Forty-Niners, Ltd. (limited partnership)	California	San Francisco 49ers
Tampa Bay Area NFL Football, Inc.	Florida	Tampa Bay Buccaneers
Pro-Football, Inc.	Maryland	Washington Redskins

The NFL and the 24 NFL member club defendants other than Pro-Football, Inc. are hereinafter referred to collectively as the "NFL defendants"; defendant Pro-Football, Inc. is referred to as the "Redskins." St. Louis Cardinals Football Co. is named defendant herein, but has not been served with process. (The Redskins were dismissed from the suit on plaintiffs' consent, at the conclusion of plaintiffs' case. That is because Edward Bennett Williams, the Redskins' principal owner, has consistently opposed the NFL cross-ownership ban.)

II.

NATURE OF INTERSTATE TRADE AND COMMERCE

No. 6: Both the NFL defendants' operation of and engagement in the business of major league professional football and the NASL plaintiffs' operation of the engagement in the business of major league professional soccer involve substantial volumes of interstate trade and com-

merce, including, *inter alia*, the following interstate activities: travel; communications, purchase and movement of equipment; broadcasts and telecasts of league games; advertisements; promotions; sales of tickets and concession items; employment of players and referees; and negotiations for all of the above.

III.

THE CHARACTERISTICS OF PROFESSIONAL TEAM SPORTS LEAGUES

No. 7: The NASL and the NFL are two of the major professional sports leagues in the United States. Each is composed of member teams located throughout the United States (and, in the case of the NASL, in parts of Canada) which compete on the playing field with each other and also operate jointly to promote attendance at and fan interest in the games which they play and to create and market professional athletic entertainment events in competition with other sports leagues (and other producers and marketers of sports and other entertainment events.)

No. 8: The NASL and NFL, along with the other major professional sports leagues in hockey, basketball and baseball, compete with each other in the entertainment industry.

No. 9: The NASL, the NFL and the other major professional sports leagues all compete in interstate commerce for fan interest, media attention, advertising revenues and network television revenues. The primary "products" sold to the public by the individual sports leagues and/or their member teams, including the NFL and NASL, are tickets for spectator viewing and the broadcast rights to games which the individual clubs play with other league members.

Appendix B

No. 10: In the case of ticket sales and sale of local radio/television broadcasting rights, this competition occurs within the metropolitan areas in which any two or more leagues have teams; in the case of network broadcasting and telecasting rights, it occurs in a market including the entire United States and some contiguous areas of Canada.

No. 11: The ways in which the NFL, the NASL and other professional sports leagues organize the activities to be carried out by a central league office, various committees and the member clubs individually vary from league to league. Professional team sports leagues like the NFL and NASL, as opposed to their individual member teams, are generally responsible for, *inter alia*: national promotional activities; the negotiation of network television contracts; the employment of referees; the structure and rules of competition for the sport; certain aspects of player relations; and the establishment and enforcement of rules governing league membership.

No. 12: The individual clubs which comprise the NASL, like those which make up the NFL, each require, *inter alia*:

(a) adequate capital investment to support operations;

(b) membership in a league in which the member teams are reasonably well matched in playing ability;

(c) the employment of a group of highly skilled players;

(d) location in a geographic area that is able to support the team by attendance at games sufficient to provide adequate revenues;

(e) the sale of radio, television and ancillary rights to the games which they play; and

(f) a share of league revenues or funds from other sources adequate to assure the ability to field a team which is reasonably well matched with others in the same league.

Appendix B

No. 13: The economic success of each franchise in a professional sports league is dependent on the quality of sports competition throughout the league and the economic strength and stability of other league members.

No. 14: Damage to or the loss of any professional sports league members ordinarily damages the stability, success and operations of both the league and its individual members.

IV.

MARKETS IN WHICH PROFESSIONAL TEAM SPORTS LEAGUES COMPETE WITH EACH OTHER

No. 15: As noted in Finding No. 8, *supra*, professional sports leagues compete with each other in the entertainment industry. The general entertainment market includes television, and indentifiable submarkets such as professional sports, professional team sports, and specialized television sports programming.

No. 16: The NASL contends that the leagues also compete with each other in a market for "sports ownership capital and skill," whose boundaries are confined to individuals presently owning controlling interests in major league sports teams. I find, however, that to the extent a "sports ownership capital and skill" market exists, its boundaries are significantly wider than the NASL suggests. The market includes sports-minded, wealthy individuals who are not presently team owners, but would be receptive to an attractive investment opportunity in the field; and corporations of the type previously and presently involved in professional sports team ownership.

No. 17: As for individuals, the NASL's perception of a "sports ownership capital and skill" market is based upon

an archetypal figure I came to know during the trial. I shall call him, for lack of a better word, the "sportsman." The sportsman has these distinguishing characteristics: love of sport; love of the limelight (or at least a willingness to be exposed to public view); substantial capital and a readiness to risk it in ventures with the potential for large short-term losses; and, in some cases, a familial affection for the city in which his teams perform. Sportsmen who testified during the trial included Lamar Hunt of Dallas; Joseph Robbie of Miami; Leonard Tose of Philadelphia; Edward Bennett Williams of Washington; Aaron Fogelman of Memphis; and Peter Pocklington of Edmonton. Just as some successful individuals turn for their extracurricular fulfillment to music (Avery Fisher Hall), rare books (the Beinecke Library), or fine art (the Frick Museum), so these individuals, at various stages in their personal races through life, have turned to professional sports.

No. 18: The paths by which individuals come to professional sports team ownership vary, as to the individuals themselves. Hunt has for a number of years focused his energies and largely inherited fortune upon a variety of sporting ventures: controlling ownership of the NFL Kansas City Chiefs and the NASL Dallas Tornado, as well as a leading role in professional tennis tournaments. Williams acted as attorney for other individuals who owned the Redskins, eventually acquired a controlling ownership himself, and recently expanded his sports interests to ownership of the baseball Baltimore Orioles. Pocklington was a businessman (meatpacking, car dealership, real estate development) who acquired his first sports ownership interest in the Edmonton Oilers (then of the now defunct World Hockey Association, now a National Hockey League team) as the result of a casual exchange with a friend. Tose is

chairman of an interstate trucking company, who in 1969 acquired a minority interest in the Philadelphia Eagles, and now owns 99 per cent of the team. These individuals illustrate the ways in which, from various walks of life, one can become a professional sports team owner, frequently without prior experience in the field.

No. 19: Corporate owners have been a significant factor in American professional team sports. The NFL's by-laws prohibit corporate ownership as a matter of policy, but the other four major leagues do not. Major league baseball currently has 10 corporate investors in control group positions; the NASL has 8 (including Molson Breweries' recent acquisition of the Philadelphia franchise); the National Basketball Association has 3; and the National Hockey League 8. Thus 29 corporations hold controlling interests in four major sports leagues. The industries most heavily represented among corporate sports owners are those involved in consumer products sold to sports fans (beer, soft drinks and other beverages, cigarettes, home building supplies), or in communications, which market sports. Many other corporations, not currently sports owners, fit this profile. There are also a number of corporations in other fields that are identified with a particular city, and have invested in one of that city's professional teams.

No. 20: Shifts between individual and corporate ownership occur. We have noted the sale of the Philadelphia NASL franchise by a limited partnership of individuals to a corporation. Conversely, I may judicially notice that some years ago, CBS, a communications corporation, sold the baseball New York Yankees to a group of individuals headed by George Steinbrenner, who conforms neatly to the "sportsman" profile described in Finding No. 17.

Appendix B

No. 21: The presence of potential individual or corporate investors in professional sports precludes an effort to confine the boundaries of a "sports ownership capital and skill" market to present major league sports owners. While the NASL has been relatively unsuccessful in recent years in attracting potential investors, that is because the league has lot increasing amounts of money over the years. In 1979, for the second consecutive year, every NASL team operated at a loss, with some teams losing in excess of $2,000,000; and the NASL teams showed an aggregate operating loss of over $20,000,000, the most in the NASL's history. By way of contrast, when the NFL, a consistently profitable league, expanded by adding the Seattle and Tampa Bay franchises in 1974, the league had no difficulty attracting competing bidders. The capital resources of potential sports investors are reasonably interchangeable with those of present investors.

V.

MARKETS IN WHICH CONSTITUENT MEMBER TEAMS OF A SPORTS LEAGUE COMPETE WITH EACH OTHER

No. 22: Member teams of the NASL and NFL, as in the other major sports leagues, are separate legal entities. Within a professional sports league, the member teams compete with each other in certain identifiable markets. These include competition for player services, and, where two teams of the same league play in the same geographical area, competition for the loyalty in the hearts, and dollars in the pockets, of local sports fans, as well as coverage in the local media.

Appendix B

No. 23: However, in markets where the competition pits one league against another, with joint league activity neither implicating nor impinging upon competition between member teams, the league acts in fact as a single economic entity. That is the situation with respect to competition in the identifiable economic markets revealed by the evidence in this case.

VI.

THE RELATIVE POSITIONS OF THE NFL AND NASL AMONG PROFESSIONAL TEAM SPORTS

No. 24: In the past decade, the NFL has been the most successful professional sports league in the United States with respect to average per-game attendance, network media revenues and coverage, average value of franchises and total league-wide and per-club revenues.

No. 25: Soccer is one of the fastest growing sports in the United States on both the amateur and professional sports levels.

No. 26: Since 1968, professional soccer has experienced substantial and accelerating growth in fan interest, media following, paid attendance, number of franchises and geographic scope, and the NASL has emerged as the leading professional soccer league in the United States.

No. 27: The NASL and its predecessor leagues have engaged in the business of presenting professional soccer in the United States continuously for approximately 13 years. Compared to the other major professional sports leagues in football, baseball, basketball and hockey currently competing with the NASL in the U. S. professional sports, pro-

fessional team sports and television programming markets, the NASL is by far the youngest, the least mature, and the most recent entrant.

No. 28: In order to compete with these other pre-existing professional sports leagues, the NASL needs to: (i) develop fan and media interest in a relatively new sport, (ii) attract and maintain sufficient sources of capital and entrepreneurial skill, and (iii) gain access to suitable stadium facilities.

No. 29: As a relatively new professional sports league, the NASL must also develop fan loyalties and interest.

No. 30: In the past decade, which included the early years of NASL history, each of the other major professional sports leagues—the NFL, Major League Baseball ("MLB"), the National Basketball Association ("NBA") and the National Hockey League ("NHL")—all exceeded the NASL in per-game attendance and seasonal attendance, and at least the NFL and Major League Baseball exceeded the NASL in gross media revenues received.

No. 31: The NFL and Major League Baseball are approximately equivalent in public popularity and financial health, followed by the other major professional sports leagues in basketball, hockey and soccer. The NFL is not "dominant" over its competitors. The NFL seeks to compete with the NASL and other professional sports leagues and to develop a totally independent strategy for the marketing of its products.

No. 32: Competition between the NASL and NFL has grown over the past few years because of the similarity between the two sports and the overlaps between their

seasons, their franchise locations and, in some cases, their stadiums.

No. 33: While the ability of professional sports teams to operate at a profit depends upon several factors, including league-wide and local television and radio revenues, gross attendance, ticket prices, stadium size, local population (i. e., spectator base) and the success of a particular team on the playing field, the existence of a lucrative network television contract is particularly important. In that regard, the NFL has far outstripped the NASL. The NFL currently enjoys contracts with the three major television networks which yield about $650 million over four years, or $5,200,000 per team per year. In 1979 the NASL's network television contract provided only $500,000, or $21,000 per team.

No. 34: The NASL has undergone a continuing process of change and experimentation in ownership and franchise location over the past eleven years. Since the NASL's formation in 1968, through the time of trial, 41 NASL franchises have either been sold, moved or ceased operations and 25 franchises have, at one time or another, been added to the league.

No. 35: Apart from the divestiture of NASL ownership interests which could result from implementation of the NFL Constitution and By-law amendment in issue in this litigation, at least seven NASL franchises were at the time of trial seeking refinancing or transfers of club ownership and/or locations.

Appendix B

VII.

THE STRUCTURE OF NASL AND NFL OWNERSHIP

No. 36: One of the NFL's ownership policies is that, as far as possible, each NFL team have a 51% controlling owner. Thus, the number of NFL owners with operational control of NFL teams (by virtue either of majority ownership or a position such as managing general partner or chief executive officer) is less than 50. Another of the NFL's ownership policies is that the controlling owner of NFL teams cannot be a corporation whose primary business purpose is not the ownership and/or operation of an NFL team.

No. 37: Current NFL and NASL owners vary in their capital resources, personal entrepreneurial skills devoted to the activities of their team, public visibility and risk-reward incentives.

No. 38: There are similarities between the operation of the NASL and its teams and the operation of the NFL and other professional sports leagues and their teams. Many of these similarities involve the sort of operations usually handled by a small group of controlling owners and/or employee managers. Many investors in sports teams take no active role in these matters.

No. 39: Twelve NASL franchises are currently owned in whole or in part by individuals (or, in one case, the spouse of an individual) with an ownership interest in a team in another professional team sports league.

No. 40: At the time suit was commenced, four NASL franchises—i. e., those owned by Lamar Hunt, the Robbie family, Peter Pocklington and Madison Square Garden

Corporation—involved controlling ownership simultaneously in two or more major sports leagues. The other NASL cross-ownership situations involved persons or corporate entities which are either (a) controlling interest holders in one league and minority investors in another league, (b) minority investors in more than one league, or (c) in one instance, a holder of controlling interests in both an NASL team and a minor league professional baseball franchise. Since that time, the press has reported the sale of the NASL Philadelphia franchise to Molson Breweries of Montreal, a corporation which also owns the NHL Montreal Canadians. The press has also reported the decision of Madison Square Garden Corporation to sell its NASL franchise, the Washington Diplomats.

No. 41: As of the date of the commencement of this action, the ownership of four NASL clubs involved cross-ownership with NFL clubs. Lamar Hunt was the individual controlling owner of the NFL Kansas City Chiefs and the NASL Dallas Tornado. Joseph Robbie was the controlling owner of the NFL Miami Dolphins, and his wife Elizabeth the controlling owner of the NASL Fort Lauderdale Strikers. William Bidwill had an individual controlling interest in the NFL St. Louis Cardinals, and a 3 per cent interest, without active management participation, in the NASL California Surf. Certain individual beneficial owners of the NFL Seattle Seahawks also had interests in the NASL Seattle Sounders. NASL/NFL cross-ownership in respect of the Seattle franchises was subsequently eliminated. The situation in respect of Hunt, the Robbie family, and Bidwill remains unchanged. If the NFL cross-ownership ban forming the subject matter of this litigation is implemented, Hunt, the Robbies, and Bidwill must divest themselves of

their NASL interests if they wish to retain their NFL interests.

No. 42: A number of NFL and American Football League ("AFL") owners were investors in the NASL or its predecessor entities prior to 1969. Of this initial group of NFL/AFL owners, all but Mr. Hunt and Mr. Bidwill disposed of their NASL interests before 1969. Mr. Hunt thereafter played a significant role in the growth and development of the NASL, particularly during its early years.

No. 43: Because teams in a professional sports league are interdependent (see Findings Nos. 13 and 14, *supra*), strong franchises and respected, active owners are important to a league's stability and future. The presence of Hunt and the Robbie family as NASL owners has been of significant assistance to the league in attracting additional owners and capital, and in creating in the eyes of the media and the public an aura of stability and "credibility" for the NASL. Their departure, should the NFL cross-ownership ban be implemented and these individuals decide to divest themselves of their NASL interests, would have a significantly adverse effect upon the NASL. Comparable circumstances do not exist with respect to Bidwill, a minor and inactive NASL owner.

No. 44: There is no persuasive evidence that any other NFL owner, or member of his family, has seriously entertained a desire to purchase an NASL franchise, or been deterred from doing so by the NFL policy against cross-ownership. While the NASL has made repeated efforts to interest NFL owners in NASL franchises, and NFL owners have on occasion referred to the NFL cross-ownership policy as an obstacle to further consideration, in point of fact

Appendix B

NFL owners have been unreceptive to NASL overtures for two primary reasons: their evaluation of an NASL franchise as a bad investment; and agreement with the longstanding NFL policy (see Findings Nos. 45-47, *infra*) that sports team owners should not divide their energies or loyalties.

VIII.

THE NFL'S CROSS-OWNERSHIP POLICIES

No. 45: Pete Rozelle became the NFL commissioner in 1960, and holds that position today. During the 1950's a prior commissioner, Bert Bell, had expressed the view that an NFL owner should not acquire a controlling interest in another major league sports team. Bell articulated this policy as a matter of general principle, not directed at any particular rival league, but grounded in notions of conflict of interest, and the desirability of an NFL owner giving his undivided loyalties and energies to that league. An early manifestation of the policy occurred when Bell urged the owner of the NFL Baltimore franchise to abandon plans to acquire the baseball Baltimore franchise. Rozelle found himself in agreement with this policy when he became NFL commissioner, and took the same position in comparable situations in the early 1960's.

No. 46: The NFL's cross-ownership policy was not reduced to writing until 1967. At a special league meeting on January 16 of that year, representatives of the 16 teams which then comprised the league unanimously passed the following resolution:

> "RESOLVED that the National Football League does reaffirm its traditional position that no person having operating control of a franchise in the Na-

> tional Football League may acquire or possess control, directly or indirectly, of any other team sports enterprise or business, and that league counsel is instructed to draft appropriate amendments to the Constitution and By-Laws and necessary related resolutions defining the word 'control' for the purpose of this resolution."

No. 47: In June of 1966, the NFL and the American Football League ("AFL") had announced an intent to merge. The formal merger agreement was signed on December 1, 1967. The Kansas City Chiefs, owned by Lamar Hunt, was one of the AFL teams merged into the NFL. Full implementation of the NFL/AFL merger took place in 1970.

No. 48: Although the NFL 1967 resolution called for the drafting of Constitutional and By-Law amendments to ban cross-ownership, no such drafts were in fact prepared for a number of years. The cross-ownership subject continued to be discussed at league meetings, the ranks of NFL owners now swelled by the addition of the former AFL owners. Then, in a meeting of representatives of the 26 teams on May 23, 1972, the league voted 26-0 in favor of the following resolution:

> "RESOLVED, that no person owning a majority interest in or in direct or indirect operational control of a member club may acquire any interest in another major team sport. Additionally, any person holding such financial interest at the time this Resolution is adopted will in no case increase his percentage of such interest in another major team sport. The adoption of the foregoing Resolution shall not affect nor modify the provisions of

Appendix B

> Article III, Section 3.5 of the Constitution and By-Laws."

The minutes of the meeting also state:

> "In the discussion, *major team sport* was defined as major league basketball, hockey, baseball and soccer, and all agreed that there would be a best effort made to dispose of current holdings."

Comparable resolutions were enacted in succeeding years up to 1978, with the exception of 1975, when the subject was omitted from the agenda by inadvertence.

No. 49: At the time of the NFL/AFL merger, Hunt held a minority interest in the NASL's Dallas franchise. By additional purchases in 1968 and 1970, he acquired a controlling interest in that team. Thereafter Hunt signified his agreement to use his "best efforts" to dispose of his NASL interests, in compliance with the NFL's 1972 resolution; but he has taken no affirmative steps to accomplish such a divestiture.

No. 50: In the mid-1970's, Hunt continued to play an active part in the affairs of the NASL. In addition to serving on league committees, he joined in efforts to interest potential investors. Hunt aroused the particular irritation of NFL owners in Philadelphia and Minnesota when he made public declarations in those areas, extolling professional soccer and its future prospects.

No. 51: In consequence, the discussion of the cross-ownership ban in more recent NFL meetings focused increasingly upon Hunt, and his lack of progress in divesting himself of his NASL interests. The NFL owners also expressed concern with the situation posed by the Robbies, the league having learned that Mrs. Robbie had become

controlling owner of the NASL Fort Lauderdale franchise, thereby creating NFL and NASL ownership within the same family. The personal animus expressed by the more concerned NFL owners was more intense in respect of Hunt than the Robbies.

No. 52: These more recent events culminated in the proposed amendment to the NFL by-laws quoted *supra*, upon which the NFL was scheduled to vote in October, 1978, thereby triggering this action. The proposed by-law goes beyond the scope of the prior resolutions, in that family members of NFL owners are included within its prohibition, and a time within which divestiture must be accomplished is specified, with substantial monetary penalties for noncompliance.

No. 53: While Rozelle, in contemporaneous memoranda and his testimony at trial, suggested other policy reasons in favor of the cross-ownership ban contained in the proposed amendment, it is clear that a significant motivating force lies in the perception of certain NFL owners and Rozelle that cross-ownership between the NFL and NASL strengthens the NASL in its efforts to compete with the NFL.

These constitute the Court's findings which I deem necessary to resolution of the case. The parties have agreed upon other facts, and their omission from the foregoing paragraphs is not intended to suggest that I reject their accuracy.

DISCUSSION

The NASL's complaint concludes with four specific prayers for relief:

Paragraph (1) asks that the "alleged offenses" of the defendants be adjudged and declared in violation of the

Appendix B

Sherman Act, § 1. Paragraph 2 prays for a permanent injunction against any agreement (including NFL constitution of by-law provisions) "that restricts the ability of any person to maintain, expand or acquire an ownership interest in an NASL franchise." Paragraph 3 prays for the enjoining of:

> ". . . any contract, combination or conspiracy unreasonably restraining trade in the U.S. professional sports or entertainment markets, including any such agreements: (a) unreasonably restricting the access of NASL teams to stadiums or other playing facilities; (b) impairing the ability of the NASL to secure or expand network television contracts; and (c) restricting NFL trademark licensees from using advertisements or promotions dealing with the NASL and/or its trademarks."

Paragraph 4 prays for treble damages.

The proof at trial focused almost exclusively upon the cross-ownership ban, the enjoining of which the NASL seeks in paragraph 2 of its prayers for relief. Paragraph 45(b) of the complaint alleges additional unreasonable restrictions of trade—"restricting the access of NASL franchises to stadiums, impairing the ability of the NASL and its members, until recently, to negotiate network or local television contracts, and restricting the ability of third-party licensees of the NFL trademarks to deal with licensees"—which underlie paragraph 3 of the prayers for relief. However, no significant evidence was adduced in support of these additional alleged violations, either as to the merits or resulting damages; and the NASL's proposed findings of fact and post-trial memoranda are silent in respect of

them.[1] These claims may accordingly be deemed abandoned. I turn, then, to the cross-ownership ban, upon which the parties concentrated their energies.

This Court preliminary enjoined implementation of the cross-ownership ban because the NASL demonstrated a substantial threat of immediate irreparable harm, and the existence of sufficiently serious merits questions to make them a fair ground for litigation. 465 F.Supp. at 668.

The Court also ruled, in the context of the preliminary injunction motion, that the legality of the ban should be judged by the rule of reason. The parties had urged different approaches. The NASL, viewing NFL teams as horizontal competitors, characterized the ban as a boycott, illegal *per se*. The NFL viewed itself, within the relevant market, as a single economic entity, so that Sherman Act

---

[1] The NASL submitted, as part of its post-trial presentation, a helpful annotated complaint, which cross-referenced the allegations of the complaint to the NASL's proposed findings of fact. The only proposed finding relating to ¶ 45(b) of the complaint is No. 99, which reads in its entirety:

> "The NFL defendants' prior cross-ownership ban as caused damage to the business and property of the NASL plaintiffs, in an amount to be determined at trial, by depriving the NASL and its member clubs of needed infusions of new capital and sports entrepreneurial skill, which, in turn, has:
> "(a) prevented the market value of NASL franchises from rising to the levels which they would have achieved under normal supply and demand conditions;
> "(b) resulted in the loss of revenues from reduced fan popularity, attendance and support;
> "(c) reduced the current and projected value of NASL television contracts;
> "(d) resulted in the loss of revenues from reduced stability and loss of goodwill; and
> "(e) imposed substantial additional costs upon the NASL in seeking new sources of sports ownership capital and skill."

It is apparent that this proposed finding relates solely to the cross-ownership ban, and has nothing to do with the *additional* antitrust violations alleged in the complaint.

§ 1 concepts did not apply. These contentions were originally asserted on the basis of affidavits and memoranda of law. Following extensive discovery and a full trial, they are reasserted with undiminished vigor. That is as it should be. The Court's prior opinion does not foreclose the NASL's argument, asserted after trial, that the proof discloses a *per se* § 1 violation. By the same token, the Court's prior opinion does not foreclose the NFL's argument, asserted after trial, that the requisite joint action under § 1 is not present. That is so, notwithstanding this Court's earlier statement that "there is no serious dispute but that enactment of the proposed by-law amendment would constitute an agreement among the NFL and its member teams sufficient to satisfy the 'contract, combination . . . or conspiracy' language of section 1 of the Sherman Act." 465 F.Supp. at 672. In point of fact, the NFL hotly disputes that proposition.

These assertions must be considered anew, in the light of discovery and a full trial record. I begin with the NFL's contention that its conduct, as revealed by the evidence, does not fall within the Sherman Act, since if that position is well founded, certain other questions do not arise.

The NFL regards itself as "a single economically-integrated competitor," or "a single economic actor." NFL pre-trial brief at 7, 17. The NASL responds that this "single economic firm" defense "disregards more than twenty years of decisions . . . which consistently have applied Section 1 of the Sherman Act to the NFL defendants." NASL post-trial brief at 129. Those antitrust cases involving the NFL cited in the margin [1a] the NASL refers to

---

[1a] *Radovich* v. *National Football League*, 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957); *Smith* v. *Pro-Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1977); *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982

(footnote continued on following page)

collectively as the "NFL Defendants' Antitrust Liability Cases." In addition, the NASL says that "Section 1 has also been consistently applied to other professional team reports," *ibid.*, the revelant citations also appearing in the margin.[2]

We must consider the extent to which the NFL's present argument is foreclosed by prior decisions.

A. *Antitrust Cases Involving the NFL.*

The NFL's first reported encounter with the antitrust laws appears in *United States* v. *National Football League*, 116 F.Supp. 319 (E.D.Pa.1953). The government sued to enjoin enforcement of NFL by-laws governing the telecasting and broadcasting of NFL games. A provision preventing the telecasting of outside games into the home territories of other teams, on days when the other teams are playing at home, was characterized by Judge Grim as "a clear case of allocating marketing territories among competitors, which is a practice generally held illegal under the antitrust laws." 116 F.Supp. at 322. Nonetheless, that provision, intended

---

(footnote continued from preceding page)

(D.C.Cir. 1977): *Mackey* v. *NFL*, 543 F.2d 606 (8th Cir. 1976); *Los Angeles Memorial Coliseum Commission* v. *NFL ("Coliseum II")* 484 F.Supp. 1274 (C.D.Cal.1980), *stayed pending appeal* (9th Cir. 1980); *Los Angeles Memorial Coliseum* v. *NFL ("Coliseum I")*, 468 F.Supp. 154, 164 (C.D.Cal.1979); *Bowman* v. *NFL*, 402 F.Supp. 754 (D.Minn.1975); *Kapp* v. *NFL*, 390 F.Supp. 73 (N.D.Cal.1974), *appeal vacated*, 586 F.2d 644 (9th Cir. 1978).

[2] *Linseman* v. *World Hockey Association*, 439 F.Supp. 1315 (D.Conn.1977); *Robertson* v. *National Basketball Association*, 389 F.Supp. 867 (S.D.N.Y.1975); *Philadelphia World Hockey Club, Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F.Supp. 462 (E.D.Pa.1972); *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F.Supp. 1049 (C.D.Cal.1971) *stay vacated*, 401 U.S. 1204, 91 S.Ct. 672, 28 L.Ed.2d 206 (1971).

to protect the home ticket sales of the weaker clubs and thus permit their continued competitive existence, was sustained as a reasonable restriction, and a legal restraint of trade, the court concluding:

> "The League is truly a unique business enterprise, which is entitled to protect its very existence by *agreeing* to reasonable restrictions on its member clubs." *Id.* at 326.

More restrictive provisions were held illegal, in the absence of evidence of salutary effect "on the attendance and gate receipts of a team's home games." *Id.* at 326. The court found it unnecessary to reach the NFL's contention, based on the Supreme Court's baseball games,[3] that professional football was not engaged in interstate commerce, since the restrictions "by professional football on the sale of radio and television rights impose substantial restraints on the television and radio industry," whose presence in interstate commerce was sufficient to implicate the antitrust laws. *Id.* at 327-8.[4]

In *Radovich* v. *National Football League*, 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957), the Supreme Court answered the question left open by the district court in *United States* v. *National Football League, supra.* The complaint alleged the following. Plaintiff, a football player,

---

[3] *Federal Baseball Club* v. *National League*, 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898 (1922); *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356, 74 S.Ct. 78, 98 L.Ed. 64 (1953). These cases rejected antitrust challenges to organized baseball's "reserve clauses" in player employment contracts.

[4] The district court's subsequent implementation of its ruling, 196 F.Supp. 445 (E.D.Pa.1961), led to its statutory overruling, P.L. 87-331 (1961), in which Congress authorized the NFL clubs to sell their television rights jointly.

broke his contract with the NFL's Detroit Lion's and signed with a rival league. Following disbanding of that league, plaintiff sought employment with an NFL-affiliated league. The NFL then announced plantiff was black-listed, which prevented his employment in organized football in the United States. Plaintiff alleged this conduct violated §§ 1 and 2 of the Sherman Act. The NFL moved to dismiss the complaint on the basis of the baseball cases. The Court declined to extend its baseball exemption to football, and held that the complaint sufficiently alleged a cause of action under the Sherman Act.

Player relations lie at the heart of several other cases the NASL cites. *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C.Cir.1978), held the NFL player draft to be an unreasonable restraint on trade in violation of § 1 of the Sherman Act. *Mackey* v. *National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977), held that the so-called "Rozelle Rule," restricting the movement of free agents between teams, was unlawful. *Kapp* v. *National Football League*, 390 F. Supp. 73 (N.D.Cal.1974), *aff'd on other grounds*, 586 F.2d 644 (9th Cir. 1978), held that the Rozelle Rule, NFL player draft, the "no tampering rule," and the Standard Player Contract violated the antitrust laws. In *Bowman* v. *National Football League*, 402 F.Supp. 754 (D.Minn. 1975), the district court preliminarily enjoined an NFL resolution barring the hiring in 1975 of players and coaches who had participated in the rival World Football League.

The *Los Angeles Coliseum* case, presently pending on appeal to the Ninth Circuit, involves an NFL by-law governing the location of its member clubs. Plaintiff operates the Los Angeles Coliseum, which has been vacated by the recent decision of the NFL's Los Angeles Rams to play their home

games in Anaheim, a city located south of Los Angeles in Orange County, California. The Oakland Raiders, another NFL team, thereupon announced its desire to play *its* home games at the Coliseum. That move is presently balked by an NFL by-law requiring that the transfer of a playing site be approved by three-fourths of the NFL member clubs. In *Coliseum I*, 468 F.Supp. 154, Circuit Judge Pregerson (sitting by designation), held that the NFL by-law implicated the antitrust laws, but that plaintiffff had not yet demonstrated standing to attack the by-law under §§ 1 and 2 of the Sherman Act. In *Coliseum II*, 484 F.Supp. 1274, the proposed Raiders move having been clarified, Judge Pregerson concluded that plaintiff had standing, and preliminarily enjoined enforcement of the by-law on a rule of reason analysis.

The NASL's last "NFL Defendants' Antitrust Liability Case," *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), does not in fact address the question of league liability. The promoters of an American Football League franchise in Washington, D.C. sued the operator of the NFL's Washington Redskins and the operator of the Robert F. Kennedy Stadium. A restrictive covenant in the Redskins' stadium lease prevented the stadium from being used by any other professional football team. Plaintiffs alleged that the stadium was the only suitable facility for professional football games in Washington, and that the restrictive covenant in the lease, which prevented plaintiffs from establishing an AFL franchise to compete with the Redskins in the Washington professional football market, violated §§ 1 and 3 of the Sherman Act. Following a jury verdict in defendants' favor, the court of appeals reversed and remanded on the basis of the trial judge's erroneous instructions.

Appendix B

B. *Antitrust Cases Involving Other Professional Team Sports.*

The Sherman Act cases involving other professional team sports cited by the NASL, see n. 2 *supra*, all concern restrictions of one kind or another upon a team's ability to negotiate for or sign a player to a contract.[5]

Two other professional sports league antitrust cases should be noted. In *San Francisco Seals* v. *National Hockey League*, 379 F.Supp. 966 (C.D.Cal.1974), an NHL member wishing to move its club from San Francisco to Vancouver challenged by-laws requiring league approval of such a transfer, that approval having been denied. The district court found no Sherman Act violation.

In *Levin* v. *National Basketball Association*, 385 F.Supp. 149 (S.D.N.Y.1974), prospective team purchasers sued the NBA, which had denied their application. The district court found no Sherman Act violation.

C. *Further Analysis of the Professional Sports League Antitrust Cases.*

The NFL and NASL, together with other professional sports leagues, compete in the entertainment industry.[6] The

---

[5] *Linseman* v. *World Hockey Association, supra* (WHA rule requiring that players be 20 years old, challenged by 19-year old Canadian amateur); *Robertson* v. *National Basketball Association, supra* (players attacked reserve clause, uniform player contract, and college draft); *Philadelphia World Hockey Club, Inc.* v. *Philadalphia Hockey Club, Inc., supra* (WHC, plaintiff league, attacked defendant NHL's reserve clause, standard player contract, and affiliation agreements; preliminary injunction granted on ground that NHL, with its dominance over professional major league hockey market, probably violated § 2 of Sherman Act by its efforts to preclude players whose contracts had expired from joining WHC teams; holding under Sherman Act § 1 reserved until trial); *Denver Rockets* v. *All-Pro Management, Inc., supra* (players attacked NBA by-law prohibiting players from negotiating with NBA team until four years after graduation from high school).

[6] Finding No. 8.

primary economic competition involving professional sports leagues occurs between and among the competing leagues.[7] The NFL submits that, in such competition, it acts as a single economic entity, thus precluding application of Sherman Act § 1. May I accept that submission, as the NASL argues, only by disregarding years of contrary authority, contained in the cited cases?

No case is directly in point. A professional sports league's ability, within the context of antitrust law, to condition participation of an individual in its ownership ranks upon nonparticipation in a competing league has never previously been litigated, in the Supreme Court, the Second Circuit, or elsewhere. Therefore the principle of *stare decisis* does not arise. I may accept the NFL's submission without branding myself a judge willing "stubbornly to persist in his views on a particular issue after the contrary had become part of the tissue of the law." Frankfurter, J., dissenting in *Radovich, supra,* 352 U.S. at 455, 77 S.Ct. at 396. But the NFL has urged its single economic entity concept in certain of the prior cases, without total success. I must consider whether those cases point the way to proper resolution of the case at bar.

The NASL says that, in advancing its single economic entity concept, the NFL seeks "a flat grant of immunity from Section 1" (post-trial brief at 131). That is an overstatement. The NFL did ,indeed, claim total immunity from Sherman Act coverage in *United States* v. *National Football League, supra,* and *Radovich, supra;* but *Radovich* sounded the death knell of the immunity claim, and all subsequent cases recognize that the conduct of professional sports leagues (save for baseball's charmed circle) may implicate

---

[7] NFL proposed post-trial Finding of Fact 13, to which the NASL signifies its agreement; appendix 7 to NASL post-trial brief.

antitrust law. The issue in prior cases, and the case at bar, is whether *the particular conduct involved* violates that law. Addressing that issue, several leagues have made the single economic entity argument. They are hardly undefeated, but have not been entirely shut out in judicial arenas.

In *San Francisco Seals Ltd.* v. *National Hockey League, supra,* the district court held the Sherman Act inapplicable to a member club's attack on a league by-law requiring league approval of a franchise transfer. "It is fundamental in a section 1 violation," the court wrote, "that there must be at least two independent business entities accused by combining or conspiring to restrain trade." 379 F.Supp. at 969. Within the relevant market, namely "the production of professional hockey games before live audiences," *ibid.*, the requisite plurality did not exist between plaintiff club and the other defendant clubs; nor did the by-law restrain trade. Those propositions followed from the nature of a sports league. The court observed:

> "Within the relevant market in which we are here concerned, plaintiff and defendants are not competitors in the economic sense. It is of course true that the member teams compete among themselves athletically for championship honors, and they may even compete economically, to a greater or lesser degree, in some other market not relevant to our present inquiry. *But, they are not competitors in the economic sense in this relevant market. They are, in fact, all members of a single unit competing as such with other similar professional leagues.* Consequently, the organizational scheme of the National Hockey League, by which all its members are bound, imposes no restraint upon trade or commerce in this relevant market, but rather makes possible a segment

> of commercial activity which could hardly exist without it." *Id.* at 969-970 (emphasis added).

Judge Owen of this Court adopted the rationale of *San Francisco Seals* in *Levin* v. *National Basketball Association, supra.* The NBA constitution required a three-fourths vote of the membership to approve a transfer of membership. Plaintiffs applied to purchase the Boston Celtics, and challenged the constitutional requirement when the league rejected the application. The court dismissed the antitrust complaint. Judge Owen accepted the NBA's self-characterization as a "joint venture," and then observed:

> "Each of its joint venturers holds a franchise to operate a team. While the teams compete vigorously on the basketball court, the joint venturers are dependent upon one another as partners in the league format to make it possible." 385 F.Supp. at 150.

Plaintiffs' proof was that the league members rejected their application because they were friendly with an unpopular and divisive club owner. Accepting that theory in the context of defendants' motion for summary judgment, Judge Owen held that the league members' reason for rejection "was not an anti-competitive reason," and had "neither anti-competitive intent nor effect." *Id.* at 152. The court stated:

> "While it is true that the antitrust laws apply to a professional athletic league, and that joint action by members of a league can have antitrust implications this is not such a case. Here the plaintiffs wanted to *join* with those unwilling to accept them, *not to compete with them,* but to be partners in the operation of a sports league for plaintiffs' profit." *Ibid.* (emphasis in original; footnotes omitted).

Plaintiffs had relied on *Denver Rockets* v. *All-Pro Management, Inc., supra,* one of the player contract restriction cases discussed at n.2 *ante;* but Judge Owen found *San Francisco Seals, supra,* more in point:

> "The distinguishing difference, in my opinion, is that the limiting by-law attacked in *Denver Rockets* prevented a player from entering and competing with other players in the players' market, whereas in this case the plaintiffs wanted to become partners with, not competitors of, those who excluded them. I find more applicable the rational [sic] of *San Francisco Seals, Ltd.* v. *National Hockey League,* 379 F.Supp. 966 (C.D.Cal., 1974). In that case the Court found no antitrust violations and dismissed where the Board of Governors of the National Hockey League refused to permit plaintiff to transfer its franchise from San Francisco to Vancouver, B. C., where plaintiff presumably thought it could have a more profitable operation." *Ibid.* at n.6.

Sensing intimations of single economic entity immortality in *San Francisco Seals* and *Levin,*[8] the NFL urged the con-

---

[8] Even in *United States* v. *National Football League, supra,* which the NFL doggedly characterizes as "wrongly decided" (pre-trial brief at 12 n. 2), the district court recognized "[p]rofessional football is a unique type of business. Like other professional sports which are organized on a league basis it has problems which no other business has." 116 F.Supp. at 323. In consequence, one of the television restrictions, otherwise suspect as an allocation of marketing territories, was permitted to stand because the league, "a truly unique business enterprise," was "entitled to protect its very existence by agreeing to reasonable restrictions on its member clubs." *Id.* at 326; see discussion *supra.* The NFL's primary line of defense in *United States* v. *National Football League,* decided before *Radovich, supra,*

(footnote continued on following page)

cept as a defense to the antitrust claims of that disaffected athlete James McCoy (Yazoo) Smith in *Smith* v. *Pro Football, Inc., supra.* The argument failed. The *Smith* court acknowledged that "[t]he [NFL] clubs operate basically as a joint venture in producing an entertainment product—football games and telecasts." 593 F.2d at 1179. *Levin* and *San Francisco Seals* were cited, *ibid.* at n.19, as noting "joint venture" characteristics of the NBA and NHL. In consequence, the *Smith* court declined to condemn the NFL player draft as a *per se* illegal boycott between horizontal competitors. But the draft implicated antitrust law, and failed to survive rule of reason analysis, because of its "severely anticompetitive impact on the market for players' services," *id.* at 1183, a market in which the league members unquestionably competed with each other. Thus the NFL brief in *Smith* conceded that the draft 'restricts competition among the NFL clubs for the services of graduating college players,' " an anticompetitive purpose producing the intended anticompetitive effect:

> "The draft inescapably forces each seller of football services to deal with one, and only one, buyer, robbing the seller, as in any monopolistic market, of any real bargaining power. The draft, as the District Court found, 'leaves no room whatever for *competitors among the teams for the services of college players* and utterly strips them of any measure of

---

(footnote continued from preceding page)

foreclosed the issue, was that the NFL's activities did not affect interstate commerce. "The "single economic entity" defense does not appear to have been asserted. Judge Grim upheld the restriction in question by resort to the rule of reason. But Judge Grim's analysis may arguably be regarded as an old testament prophecy of a new message soon to be preached.

> control over the marketing of their talents.' " *Id.* at 1185 (emphasis added).

Enter Sherman Act § 1; exit the player draft, under the rule of reason.

The NFL next sent the single economic entity concept in to call defensive signals in the *Los Angeles Coliseum* case. The litigation arose, it will be remembered, out of the Oakland Raiders' desire to move from the greater San Francisco area to play their home games in Los Angeles, and the eagerness of the Los Angeles Coliseum to receive them, the Los Angeles Rams having vacated the Coliseum to play at Anaheim, in neighboring Orange County. At issue is the validity of an NFL by-law restricting such a transfer. Circuit Judge Pregerson, preliminarily enjoining enforcement of the by-law, rejected the single economic entity defense. He commences his discussion by observing:

> "Whether NFL teams engage in economic competition as independent units is a troublesome question. The relationship between the teams does not fit the traditional competitive mold." 468 F.Supp. at 163.

While the court recognized the economic necessity of cooperation in certain areas, it also pointed out that the NFL teams are separately owned, do not share profits and losses, and "compete for college players and NFL players who are 'free agents.' " *Ibid.* Judge Pregerson then focused upon another area of competition, central to the case before him:

> "If another NFL team were to play its home games in the Coliseum, that team and the Rams would compete to some extent for fan support in the Southern California area and thus for ticket sales and other revenue." *Ibid.*

The court reached this conclusion:

> "The court concludes that competition for players and, depending on a team's location, competition for fans, indicates that the NFL teams are economic competitors, though not in the traditional sense. This view is supported by a number of cases where courts have held that the rules of a professional sports league violated § 1 of the Sherman Act. In reaching that conclusion, these courts necessarily found that the teams making up the league were engaged in economic competition." *Id.* at 164.

The citations which follow relate to sports league restrictions upon player contracts.

Granting a preliminary injunction in *Coliseum II*, Judge Pregerson stated:

> "The primary anticompetitive aspect of § 4.3 is fairly self-evident: a rule which inhibits teams from transferring their home locations may act to prevent an existing team from transferring into the Los Angeles-Orange County area to compete with a team already there for dollars in the pockets of sports fans. In addition, a rule which hinders a new NFL team from moving into Los Angeles would inhibit local competition for football players, coaches, and other personnel." 484 F.Supp. at 1277.[9]

---

[9] With respect, I am bound to say that the second perceived anti-competitive effect is less apparent. Competition among NFL teams for key personnel such as players and coaches is nationwide; *quaere* whether the presence of two teams in one playing area adds an extra dimension to this particular competition. But the direct competition between such teams for the limited amount of leisure time dollars "in the pockets of sports fans" in the same playing area cannot be gainsaid, and on my reading of the *Coliseum* opinions furnishes the *raison d'etre* for the Sherman Act § 1 preliminary injunction.

Appendix B

These are the cases which consider the concept of the NFL as a single economic entity.[10] What conclusions may one draw? First, the courts do not reject the concept out of hand. On the contrary, Judge Grim's characterization of a professional sports league as "truly a unique business enterprise" [11] is echoed in later cases, most recently by Judge Pregerson's observation in *Coliseum I* that "[t]he relationship between the teams does not fit the traditional competitive mold." 468 F.Supp. at 163. But courts have rejected the NFL's defense, based upon the single economic entity concept, in the particular circumstances considered above. A tension unmistakably arises between the concept of a league, whose members must combine and cooperate if the league is to function at all, and the Sherman Act § 1's prohibition of *combinations* in restraint of trade, which requires the presence of "at least two independent business entities," *San Francisco Seals, supra,* at 379 F.Supp. 969.

Analysis of the cases suggests a resolution of that tension. If member teams of a professional sports league compete with each other in an identifiable market, § 1 of the Sherman Act applies; the legality of restraints on such competition is judged by the rule of reason; and third parties damaged by illegal restraints may claim Clayton Act remedies. Thus the single economic entity defense fails in the player contract restriction cases, where all member teams compete with each

---

[10] As noted *ante, Hecht* v. *Pro-Football, Inc.*, also cited by the NASL, considered a contract between a single NFL club and a wholly independent stadium operator which denied a vital resource (the stadium) to a competing NFL franchise. Concerted league activity was not involved; the requisite number of economic actors arose from the NFL club and the stadium operator. *Hecht* is not pertinent to the issue under consideration in the case at bar.

[11] *United States* v. *National Football League, supra,* at 116 F.Supp. 326.

other for players, and league restraint of that competition damages the players. Similarly, the defense fails where two member teams would compete in the same geographical area for sports fans' dollars, and league restraint of that competition damages a stadium operator. But if joint league conduct neither implicates nor impinges upon competition between the member clubs, then the professional sports league, that unique business enterprise not fitting the usual competitive mold, may properly be regarded as a single economic entity; and in those circumstances, § 1 of the Sherman Act has no office to perform.

That is so, even if the joint league conduct disadvantages another competitor in the entertainment industry. The distinction lies between competition and competitors. "The law is well established that it is competition, and not individual competitors, that is protected by the antitrust laws." *Levin, supra,* at 152, citing *Checker Motors Corp.* v. *Chrysler Corp.,* 283 F.Supp. 876 (S.D.N.Y.1968), *aff'd,* 405 F.2d 319 (2d Cir. 1969), *cert. denied,* 394 U.S. 999, 89 S.Ct. 1595, 22 L.Ed.2d 777 (1969). Economic conduct may damage competitors. Indeed, it may be specifically designed to do so. There is nothing illegal in that. Competitors compete. The disadvantaged competitor's injury is compensable under the Clayton Act if, and only if, such injury is a particularized manifestation of that greater public injury proscribed by the Sherman Act. This basic distinction was well stated by Judge Thomsen in *Schwing Motor Co.* v. *Hudson Sales Corp.,* 138 F.Supp. 899, 903 (D.Md. 1956), *aff'd,* 239 F.2d 176 (4th Cir. 1956), *cert. denied,* 355 U.S. 823, 78 S.Ct. 30, 2 L.Ed.2d 38 (1957):

> "The main purpose of the anti-trust laws is to protect the public from monopolies and restraints of trade, and the individual right of action for treble damages

> is incidental and subordinate to that main purpose. (cases cited). Public injury alone justifies the threefold increase in damages. It is essential, therefore, that the complaint allege facts from which it can be determined that the conduct charged to be in violation of the anti-trust laws was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce. (cases cited)."

If competition between the NASL and NFL truly pits league against league—an economic rivalry uncomplicated by competition between the league members *inter se*—then the sports league cases discussed *supra*, viewed in the light of established antitrust principles, appear to take this case beyond the boundaries of the Sherman Act, unless Supreme Court or Second Circuit authority in other antitrust areas require a different conclusion. I consider those questions in turn.

D. *The Nature of the Competition Between the NASL and NFL.*

This question does not require extended discussion. Competition between the NASL and NFL in the entertainment industry is one on one: league against league. Judge Curtis was quite right in *San Francisco Seals, supra*, when he said that the "main purpose" of a professional sports league is "producing sporting events of uniformly high quality," the member teams "acting together as one single business enterprise, competing against other similarly organized professional leagues." 379 F.Supp. at 969. It is the league product —its sporting events—which compete against the comparable product of competing leagues. The NASL's product is NASL soccer. The NFL's product is NFL football. The

other competing products are major league baseball, NHL hockey, and NBA basketball. The degree of competition grows greater as the traditional sports seasons expand under the influence of television marketing. When I was a child, I played as a child: baseball in summer, football in fall, hockey in winter. But now that commercial sports marketing has made me a man, I put away childish limitations, and sit before my television to watch hockey in late May, football in the heat of early August, and baseball in the chilly night winds of late October.[12] Competition between the NASL and NFL has grown in recent years, in part, because their seasons overlap.[13] Increasingly, the seasons of all five major league sports overlap. The resulting competition is between sports events in the generic sense: professional football, soccer, baseball, basketball, and hockey. These are products which only the professional league, acting as a single entity, can manufacture.

This proposition is essentially undisputed. As noted *ante*,[14] the parties agree that the primary economic competition in professional sports "occurs between and among the competing leagues."

---

[12] I may judicially notice, from the public press, that the NHL Stanley Cup final round's last game was played on May 24, 1980—over six weeks after the baseball season began on April 9. NFL preseason football games were available on television during the first week in August. In 1979, baseball's World Series was not completed until October 17; the Series began this year on October 14. Last year the press featured photographs of baseball commissioner Kuhn, observing the World Series from his field box, *sans* topcoat or sweater in the cold October night, manfully pretending it was not cold. The NBA has confined itself somewhat more closely to what one thinks of as a traditional season, from mid-October to mid-May.

[13] Finding No. 32. In recent years, the NASL has extended its play-off season into September, while the NFL commences its preseason televised games in late July or early August.

[14] See text at fn. 6, 7.

Appendix B

The reality of league against league competition is recognized by Louis Guth, the NASL's expert witness. In Guth's view, "major professional team sports is a submarket of the general entertainment industry." Affidavit at ¶ 24.[15] Within that entertainment industry submarket, all the major professional team sports leagues compete in at least three further submarkets:

(1) the major professional team sports market;

(2) the sports programming market;

(3) the market for sports ownership capital and skill. *Id.* at ¶ 14.

As to the first of these three perceived submarkets, the "major professional team sports market," Guth testified that "the primary 'product' offered is live attendance at league-sanctioned contests," generating ticket sale and ancillary revenues from the "buyers," members of the general public. *Id.* at ¶ 15. In my view, it is something of a misnomer to say that the "product" offered is "live attendance." Judge Curtis was closer to the mark in *San Francisco Seals* when he defined the product as "sporting events of uniformly high quality." "Live attendance" reflects the favor bestowed (at a price) by the buying public upon the product.[16] But it makes no difference, since in any event Guth agrees, in general, that because of a league's necessary interdependence, in many circumstances "economic competition by professional team sports leagues occurs most vigorously on a

---

[15] Under the Court's pre-trial order, the direct testimony of the parties' expert witnesses was submitted in affidavit form, followed by "live" cross and redirect examination at trial.

[16] A legendary boxing manager is supposed to have replied, to a promoter extolling the virtues of a large arena in a remote location: "It's not the seats you've got, but the behinds you can put in them."

league-wide, intersport basis," *id.* at 21; and, in particular, "the major professional team sports market is a concentrated industry in which there are only live principal rivals . . . The effectiveness of competition in the major professional team sports market thus depends on the level of rivalry between the five existing major leagues . . . ," *ibid.*

The second submarket, sports programming, also involves league against league competition. As Mr. Guth observes: "The same five major professional team sports leagues which participate in the professional team sports market also compete to sell broadcast rights to their games in the sports programming market," the principal buyers in that market being "the three major television networks." *Id.* at ¶¶ 39, 40. It is entirely clear from the evidence that, in this competition as well, each league acts as a single entity. The NASL and NFL bargain with the television networks by means of negotiating committees which speak for the entire league. That negotiation is crucial because, in today's market, a nationwide television contract is of great importance to a professional league's viability. The networks, in turn, evaluate the strength of the sports league's generic product as a competitor in the market for television viewers and advertisers, adjust the terms offered to the leagues accordingly, and compile their individual rating and market share statistics on the basis of the league sports, not the individual teams.[17]

Thus, in both these submarkets, the sports leagues compete with each other as single entities, offering products which, but for the concerted action of the member clubs, simply would not exist.

---

[17] See Guth affidavit, Ex. 12, citing statistics tabulated by *Trends in Performance in Sports Programming*, CBG/National Television Research, March, 1979.

Appendix B

The NASL stresses that the NFL clubs are separate and distinct legal entities. That is true; and the separate nature of the clubs manifests itself in the various ways the NASL summarizes at 131-133 of its main brief after trial: the 28 NFL clubs maintain separate books, do not share profits or losses, do not share certain sources of revenue or expenses, contract in their own name in certain respects, have independent incentives to make their team successful, do not share all financial information, and each club is free to spend its profits as it chooses. I recognized in the decision granting the preliminary injunction that "[t]hough united in a joint venture, the NFL members are discrete business entities—individuals, partnerships and corporations—whose concerted action *can have* antitrust implications." 465 F.Supp. at 675 (emphasis added). The further questions to be answered on a full trial record are (1) whether the concerted actions of professional sports league members *always* have antitrust implications; and (2) if that concerted action does not restrain competition among the league members, whether the antitrust laws are implicated at all. On the basis of the professional sports league cases, as analyzed *ante*, both questions appear to call for negative answers.

The third revelant submarket identified by Mr. Guth and urged by the NASL is "the market for sports ownership capital and skill." Guth affidavit (admitted as the witness's direct testimony under the pre-trial order), at ¶ 14. This is characterized as a "factor market." Professional sports leagues are viewed as needing to acquire vital factors of production, and, to that end, compete to sell their franchises in a market for sports ownership capital and skill. *Id.* at ¶ 17. "Potential investors" can be viewed as the demand side of the market, with franchises viewed as the supply. *Id.* at ¶ 42. After analyzing the characteristics of a sports

franchise owner, Guth concludes that "the most desirable owners for a league (and particularly for a new entrant) are (non-corporate) individuals with previous or concurrent sports ownership experience who are willing and able to purchase a controlling interest in a franchise and to provide it with access to substantial capital resources." *Id.* at ¶ 44. Individuals who are presently sports team owners are regarded by Guth in his trial testimony as constituting the "actual market," Tr. 1940-41, as opposed to the broader market of "potential investors" referred to in his affidavit at ¶ 42. The cross-ownership ban is condemned as anticompetitive because it deprives the NASL plaintiffs of NFL owners as possible sources of sports ownership capital and skill, a particularly serious problem for a sport which Guth analogizes to an "infant industry." *Id.* at ¶ 59. The NASL's contention is summarized in its post-trial reply brief, at p. 46:

> ". . . controlling NFL team owners comprise a significant (and highly desirable part) of a relevant market for sports ownership capital and skill . . . Group restrictions on the investment decisions of such owners, therefore, necessarily constitute an unreasonable restraint of trade."

The NFL's response, based upon the testimony of its expert witness, Bruce Caputo, is that the NASL is a business, whose "capital and skill requirements can be studied in much the same manner as those of other businesses." Caputo affidavit at ¶ 7. "Capital is fungible, and there is a capital market; . . . In the case of the North American Soccer League, the capital market in question is worldwide . . . I do not believe that there is a meaningful separate market composed of 'especially desirable sports ownership capital'

as plaintiffs contend." *Id.* at ¶¶ 8, 14, 15. The NFL's pretrial brief, at p. 36, characterizes Caputo's testimony as explaining "the impropriety of substituting for the real-world capital market an artificial alleged market containing only those capital suppliers deemed 'most desirable' by plaintiffs."

The NASL, as plaintiff, bears the burden of proving the existence of the submarket in which competition is said to be restrained. Definitions of "market" within the antitrust context "will vary with the part of commerce under consideration." *United States* v. *E. I. du Pont & Co.*, 351 U.S. 377, 404, 76 S.Ct. 994, 1012, 100 L.Ed. 1264 (1956). We are considering the capital market. Both parties agree there is one. The issue is the reach of its boundaries. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co., Inc.* v. *United States*, 370 U.S. 294, 325, 82 S.Ct.1502, 1523, 8 L.Ed.2d 510 (1962). Definitional precision is not possible; "no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal," *du Pont, supra*, 351 U.S. at 395, 76 S.Ct. at 1007. A submarket exists where the products in question "have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct" from all other products to make them a "line of commerce" within the meaning of the antitrust laws. *United States* v. *du Pont & Co.*, 353 U.S. 586, 593-94, 77 S.Ct. 872, 877-78, 1 L.Ed.2d 1057 (1957). The existence of "marked differences" between products or services militates against a conclusion that "the interchangeability test of the *du Pont case*" has been met; a "low degree of differentiation" points the other way. *United States* v.

Grinnell Corp., 384 U.S. 563, 573, 86 S.Ct. 1698, 1705, 16 L.Ed.2d 778 (1966).

The cited cases arise out of Sherman Act § 1 or Clayton Act § 7, and deal with products or services, but their rationale applies to Sherman Act § 1, and the capital market; both parties in the case at bar rely upon them as authority. The holdings in these cases illustrate the operation of the governing principle. *du Pont*, 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264, rejected the government's contention of a market limited to cellophane, and accepted defendant's concept of a broader (and non-monopolized) "flexible packaging materials" market: ". . . du Pont should not be found to monopolize cellophane when that product has the competition and interchangeabiilty with other wrappings that this record shows." 351 U.S. at 404, 76 S.Ct. at 1012. *du Pont*, 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057, rejected defendant's contention that the relevant market was "coextensive with the total market for finishes and fabrics," and limited the market to *automotive* finishes and fabrics because the record showed they had "sufficient peculiar characteristics and uses" to stand alone as a submarket. 353 U.S. at 593-94, 77 S.Ct. at 877-878. *Brown Shoe* held that the relevant markets were men's, women's, and children's shoes: "Those product lines are recognized by the public; each line is manufactured in separate plants; each has characteristics peculiar to itself rendering it generally noncompetitive with the others; and each is, of course, directed toward a distinct class of customers." 370 U.S. at 326, 82 S.Ct. at 1524. The Court in *Brown Shoe* rejected defendant's argument that "price/quality" and "age/sex" distinctions in shoes gave rise to further submarkets, thereby rendering the products of the company it sought to acquire noncompetitive with its own products, and avoiding a Clay-

ton Act § 7 problem. *Grinnell* held that the "high degree of differentiation between central station protection and the other forms" of personal property protective devices justified treating the accredited central station service business as a single market. 384 U.S. at 574, 86 S.Ct. at 1705.

Application of these holdings to the case at bar poses some surface anomalies. We must visualize individual sports team investors such as Lamar Hunt (NASL Dallas Tornado and NFL Kansas City Chiefs), or a corporate investor such as Warner Communications (NASL New York Cosmos), as the economic equivalents of cellophane, finishes and fabrics, shoes, or protective systems. However, as *du Pont* teaches, the parts of commerce may vary, but "[t]he tests are constant," and the key is "reasonable interchangeability," 351 U.S. at 404, 76 S.Ct. at 1012.

Although the NASL's expert witness, Mr. Guth, referred in his direct testimony to "*potential* investors" as "the demand side of the [sports ownership capital and skill] market," affidavit at ¶ 42 (emphasis and material in brackets supplied), his testimony at trial under cross-examination narrowed the boundaries of the suggested market to "those individuals who are currently controlling owners of major professional team sports franchises." Tr. 1968. That is the "actual market"; "potential investors" fall outside its boundaries, although "to the extent that they can easily enter that activity, they represent a very important economic factor." Tr. 1941. At one point in his testimony, Guth deprecated the value of generalizations in determining the likelihood of a potential investor entering the professional sports world: " . . . with regard to the generalizations they are useful only as kind of starting points, and then you have to evaluate each of the individuals." Tr. 1950. Notwithstanding that *caveat*, Guth shortly thereafter offered a striking generalization:

Appendix B

> Q. "Are persons with non-ownership experience in some other sport such as baseball or football who have or have access to adequate capital under any circumstances going to be likely investors in the analysis?"
> A. "No. That doesn't mean that they might not make an investment, but they are certainly not likely from the standpoint of potential. As a generalization, again, if suddenly great riches fell into my lap, I might be interested in investing in a football team or baseball team or something like that, *but as a generalization, individuals with wealth today who are not currently involved in sports investments and in guiding the development of sports teams I would not say are in any sense likely investors.*" Tr. 1978 (emphasis added).

Thus, in the NASL's view, *present* sports owners comprise the *actual* sports capital and skill market, of which NFL owners form a significant part. The NASL argues that NFL's concept of a worldwide capital market for soccer, based on Caputo's analysis, bears no resemblance to the real world.

In my judgment, neither party has a monopoly on the real world. I reject the extremes of both the Guth and Caputo perceptions. Individuals and corporations alike have identifiable characteristics which incline them toward sports ownership. Findings Nos. 17-18. The absence of such characteristics, in an individual or corporation, effectively removes them from the *sports* capital market, thereby shrinking the worldwide boundaries envisioned by Caputo. But there is no basis, in logic or law, for restricting the boundaries of that submarket, as would Guth, to individuals who are presently controlling owners of a major league team.

That narrow perception disregards significant, interchangeable sources of sports capital: individuals who are not presently controlling sports owners; and corporations.

As to individuals, the NASL's analysis holds water only if we assume that the present individual owners are the only people in the world with the requisite capital and interest in sports—the only people, that is, who fit the "sportsman" profile, Finding No. 17. The proposition is unrealistic on its face. Sports continue to exert their traditional fascination upon the American character, a fascination nurtured and enhanced by modern media marketing. And a startling number of individuals manage, year after year, to amass personal fortunes, despite the best efforts of the tax collectors. Sports-minded capitalists are out there. They must be. And like-minded capitalists are economically interchangeable. Capital is, indeed, fungible.

As for corporations, they have played a significant role in major sports league ownership, including that of the NASL. Finding No. 19. The NFL's by-laws prohibit corporate ownership, and the NASL makes much of that in its briefs; but the absence of corporate owners in the NFL, which prohibits them, is of no relevance to a consideration of interchangeable corporate capital for the NASL, which does not.

The NASL seeks to buttress its market concept with two assertions which, while factually accurate, do not address the basic issue. The first is that cross-ownership has frequently occurred in professional team sports. The second is that the NASL's recent efforts to attract new capital, individual or corporate, have had only limited success. The first assertion is said to demonstrate that present sports owners constitute an economically discrete submarket, based upon the likelihood of further sports investment. The second

assertion is said to demonstrate the non-existence of alternative capital sources. Neither argument is persuasive.

The role of cross-owners, that is, individuals who have invested in more than one sport, is a demonstrated historical fact. But it hardly follows that, as Mr. Guth generalizes, wealthy individuals not currently involved in sports are not "in any sense likely investors" in sports. Sports investors do not spring full blown, like Topsy, upon the world's playing fields. With the exception of family members of sports team owners who succeed to control positions by death or retirement, the sports capitalist amasses his capital resources first, and then implements his sporting interest by acquiring a professional team. Sports owners come to that status by a variety of paths through life; see Finding No. 18. But the record reveals no cross-owner, past or present, individual or corporate, who was not a *non*-sports owner (and hence outside the boundaries of the NASL's suggested sports capital market) prior to his first sports investment. The boundaries of a "sports ownership capital market" must, as a matter of common sense, extend beyond present sports owners. To digress from football and soccer for a moment, I may judicially notice George Steinbrenner's purchase of the baseball New York Yankees from CBS some years ago. On the NASL's theory, Steinbrenner was outside the sports capital market until the moment when he signed the purchase contract, at which time he entered the market. In my judgment, Steinbrenner was part of the sports capital market when CBS offered the Yankees for sale. A transaction then took place which reflected the *operation* of that market. A pair of shoes is part of a products market, even if it has not yet been purchased by a consumer.

As for the NASL's difficulty in attracting new capital, that proves much about the sports capital market's evalua-

tion of an NASL franchise under present economic conditions, but nothing about the boundaries of the market itself. The melancholy fact is that the NASL's recent history has been one of league-wide and substantial losses. Finding No. 21. By way of contrast, the NFL had no difficulty attracting briskly competing bidders when it expanded in 1974 to offer new franchises in Seattle and Tampa Bay. NFL franchises are generally profitable. The NASL invites me to infer that, because it has not succeeded in selling its franchises to individuals or corporations not currently in sports, only current sports owners constitute the sports ownership capital market. I decline to infer so narrow a market, because the more logical inference is that a considerably broader capital market has passed an adverse judgment upon the NASL as an investment, under present economic conditions. Indeed, that is a judgment shared by the NFL owners themselves; I have found that those NFL owners who declined invitations to invest in NASL franchises were substantially motivated by the view that the NASL was a poor investment. Finding No. 21.

In these circumstances, I conclude the alternative sources of sports capital exist which are reasonably interchangeable with the sources represented by present, individual sports team controlling owners. The NASL has not proved that present sports owners have such peculiar characteristics as to justify constituting them a separate and distinct economic submarket. Nor has the NASL established the boundaries of a capital submarket in which the NFL cross-ownership ban operates as a restraint upon competition.

Two additional points should be made before leaving this subject. The NASL's characterization of the "sports ownership capital and skill" market as a "factor market"

does not retrieve the position. The NASL suggests in its reply brief, at p. 45, that the "factor markets for sports ownership capital and skill are appropriate for antitrust analysis" on the authority of *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328 (1948). In *Mandeville*, the Court upheld the legal sufficiency of a Sherman Act complaint which alleged that beet sugar refiners had conspired to stabilize the price they paid to growers for sugar beets grown by the latter. The refiners also controlled the supply of sugar beet seed, so that the growers, to remain in the sugar business, were required to buy seed from the refiners, as well as to sell the grown beets to the refiners at the stabilized price. Not surprisingly, the Court held that the complaint stated a cause of action in antitrust. The sugar beet, whose price was stabilized by conspiracy, was "the only raw material consumed" in the industry, 334 U.S. at 241, 68 S.Ct. at 1008; and the refiners constituted the sole source of sugar beet seeds for the growers. *Mandeville* would apply to the case at bar only if present, individual sports-controlling owners could be viewed as the sole source of sports capital, but that is clearly not the case. For comparable reasons, I suggested in the opinion on preliminary injunction that the NASL's reliance upon the "essential facility" doctrine of antitrust law was misplaced. 465 F.Supp. at 676 n.20.

Reliance is also placed on the cases dealing with teams' competition for skilled players. The differences between athletes and sources of capital funding to do not require discussion.

Secondly, to the extent that the NASL argues that "the market for sports ownership capital and skill" should be read in the disjunctive, so as to create separate markets

for capital and skill, I reject the argument. It is clear from the evidence that sports owners differ widely in the amount of time that they devote to their teams, and, in particular, in the degree to which they exert close personal control over operations. Finding Nos. 37, 38. Sports team owners who involve themselves directly and personally with their team's operations undoubtedly undergo learning experiences, and acquire sports entrepreneurial skills as a result; but the practice is by no means uniform. The opposite extreme was illustrated by Edward Bennett Williams, a witness called on behalf of the NASL, who is presently controlling owner of the NFL Washington Redskins, and has recently acquired the baseball Baltimore Orioles. In Williams' view, running a sports franchise is much like any commercial endeavor:

> "You go get the very, very best people that you can get. You give them authority, you don't interfere with them and you let them act and operate and you hold them accountable for what they do and I think that if you run a sports franchise in that way and you are able to select wise, industrious, able, prudent, honest people, that you will have success and whether you are operating one, two or three sports franchises." Tr. 1621.

Asked about areas in the operation of a professional sports franchise that are unique, as opposed to other business enterprises, Wiliams expressed the view that "any bright, reasonable person could assimilate those in two days." While others sports owners may hold a contrary view, and operate their franchises in a manner different from that described by Williams, there is no basis for holding that the present individual sports team owners constitute a separate market of sports "skill."

Appendix B

The NASL's evidence in respect of this alleged submarket comes down, in essence, only to this: there are certain present, individual sports team owners which the NASL regards as particularly *desirable*, either to retain as NASL owners, or to attract in future. Lamar Hunt and Joe Robbie certainly fall within the former category; undoubtedly other NFL owners fall within the latter category. However, the criteria for establishing the boundaries of an economic submarket are established by controlling Supreme Court authority; and the particular desires of a consumer, however sincerely or reasonably held, do not rise to that level. Another Williams wrote a play called "A Streetcar Named Desire." The NASL's concept may fairly be subtitled "A Market Named Desire." It is not a viable concept in antitrust law.

Having concluded that the NASL's suggested "sports ownership capital and skill" submarket does not exist, I need not decide whether the NASL and NFL are in actual competition with each other in the suggested area. But if competition does exist in such a submarket, it is, again, competition between two single economic entities.

Thus I return to the primary conclusion to which this discussion leads thus far. Within the identifiable submarkets, the competition between the NASL and NFL which forms the subject matter of this action is in fact competition between two single economic entities uncomplicated by any relevant competition[18] between the member

[18] I stress the concept of *relevant* competition, because as the *Los Angeles Coliseum* case demonstrates, NFL member clubs may compete with each other in the same geographic submarket for a *localized* benefit: the entertainment dollars in the pockets of the sports fans in that area. Where joint action of the member clubs restrains com-

(footnote continued on following page)

clubs of a league. Under the *ratii decidendi* of the professional sports league antitrust cases, no antitrust implications arise. Does higher antitrust authority in other areas of economic endeavor require a different conclusion?

E. *Non-Sports Antitrust Cases.*

The NASL argues that because the NFL clubs are separate corporations, they cannot "hide behind the labels 'joint venture' and 'single economic firm,'" a ploy of antitrust defendants "which has consistently been rejected by the courts." Main post-trial brief at 137-138. The cases cited for this proposition, in addition to the sports league cases discussed *ante*, are *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951), and *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968).

In *Timken* the government brought a civil action to restrain an alleged Sherman Act § 1 conspiracy between Timken Roller Bearing Co., and Ohio corporation, and British and French corporations in which Ohio Timken held ownership interests, to eliminate competition in the manufacture and sale of antifriction bearings in the markets of the world. Pursuant to agreements between them, these entities "(1) allocated trade territories among themselves; (2) fixed prices on products of one sold in the territory

---

(footnote continued from preceding page)

petition between them and damages an outsider, an antitrust claim arises. That is the essence of *Coliseum I* and *Coliseum II*, *supra*. But the localized interclub competition Judge Pregerson held relevant to the claim of a local stadium operator is irrelevant to competition on a nationwide scale, in the stadia or on network television, between two professional leagues. Within that context, the constituent members are at one in advancing the interests of their league's joint product, to the economic disadvantage of the product of rival leagues.

of the others; (3) cooperated to protect each other's markets and to eliminate outside competition; and (4) participated in cartels to restrict imports to, and exports from, the United States." 341 U.S. at 596, 71 S.Ct. at 973. Timken sought to excuse this classic collection of illegal activities by characterizing itself, the British and French corporations as members of a "joint venture." The Court rejected the argument:

> "We cannot accept the 'joint venture' contention. That the trade restraints were merely incidental to an otherwise legitimate 'joint venture' is, to say the least, doubtful. The District Court found that the dominant purpose of the restrictive agreements into which appellant, British Timken and French Timken entered was to avoid all competition either among themselves or with others. Regardless of this, however, appellant's argument must be rejected. Our prior decisions plainly establish that agreements providing for an aggregation of trade restraints such as those existing in this case are illegal under the Act. *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U.S. 211, 213 [71 S.Ct. 259, 95 L.Ed. 219]; *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 223-224 [60 S.Ct. 811, 84 L.Ed. 1129] and note 59; *United States* v. *National Lead Co.,* [D.C.] 63 F.Supp. 513, affirmed, 332 U.S. 319; *United States* v. *American Tobacco Co.,* 221 U.S. 106, 180-184 [31 S.Ct. 632, 55 L.Ed. 663]; *Associated Press* v. *United States,* 326 U.S. 1, 15 [65 S.Ct. 1416, 89 L.Ed. 2013]. See also *United States* v. *Aluminum Co. of America,* [2 Cir.] 148 F.2d 416, 439-445. The fact that there is common ownership or control of the contracting corporations does not liberate

> them from the impact of the antitrust laws. E. g., *Keifer-Stewart Co.* v. *Seagram & Sons,* supra [430 U.S.] at 215 [71 S.Ct. 259]. Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.' Perhaps every agreement and combination to restrain trade could be so labeled." *Id.* at 597-8, 71 S.Ct. at 974-75.

In *Perma Life,* a private antitrust action for civil damages, plaintiffs were dealers who operated "Midas Muffler Shops" under sales agreements granted by Midas, Inc. Plaintiffs claimed that Midas entered into a conspiracy with its parent corporation, International Parts Corp., two other subsidiaries, and officers or agents of these corporations to restrain or lessen competition in violation of Sherman Act § 1. That restraint arose out of provisions in the sales agreements granted by Midas to each individual dealer, which:

> " . . . obligated the dealer to purchase all his mufflers from Midas, to honor the Midas guarantee on mufflers sold by any dealer, and to sell the mufflers at resale prices fixed by Midas and at locations specified in the agreement. The dealers were also obligated to purchase all their exhaust system parts from Midas, to carry the complete line of Midas products, and in general to refrain from dealing with any of Midas' competitors. " 392 U.S. at 137, 88 S.Ct. at 1983.

The first point of decision was whether plaintiff dealers, as parties to the agreements, were in *pari delicto* with these

illegal restrictions, so as to bar a claim for treble damages. The Court rejected that defense and permitted the suit, "to further the overriding public policy in favor of competition." *Id.* at 139, 88 S.Ct. at 1984. The Court then rejected the "single business entity" defense, which the Seventh Circuit had accepted:

> "There remains for consideration only the Court of Appeals' alternative holding that the Sherman Act claim should be dismissed because respondents were all part of a single business entity and were therefore entitled to cooperate without creating an illegal conspiracy. But since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities. See *Timken Co.* v. *United States*, 341 U.S. 593, 598 [71 S.Ct. 971, 95 L.E. 1199] (1951); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227 [67 S.Ct. 1560, 91 L.Ed. 2010] (1947). In any event each petitioner can clearly charge a combination between Midas and himself, as of the day he unwillingly complied with the restrictive franchise agreements, *Albrecht* v. *Herald Co.*, 390 U.S. 145, 150 [88 S.Ct. 869, 19 L.Ed.2d 998] n.6 (1968); *Simpson* v. *Union Oil Co.* [377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98] supra, or between Midas and other franchise dealers, whose acquiescence in Midas' firmly enforced restraints was induced by (the communicated danger of termination,) *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 372 [87 S.Ct. 1856, 18 L.Ed.2d 1249] (1967); *United States* v. *Parke, Davis & Co.*, 362

U.S. 29 [80 S.Ct. 503, 4 L.Ed.2d 505] (1960)." *Id.* at 141-2, 88 S.Ct. at 1986.

Timken and *Perma Life* unquestionably hold that "joint venture" or "single economic entity" concepts could not justify the anticompetitive conduct of those particular defendants. But these cases do not require rejection of the concept in the case at bar. That is because of the unique nature of a professional sports league and its product, repeatedly recognized by the courts albeit in different contexts. Single companies can, and do, make bearings and mufflers. No interdependence or joint action is necessary to make a bearing or a muffler. Companies manufacturing such articles are horizontal competitors in their respective markets. *Timken* and *Perma Life* hold that companies cannot conspire or combine to restrain such competition, even if common ownership or other intercorporate relationships might otherwise support the label "joint venture" or "single economic entity."

The professional sports league is entirely different. The individual teams cannot, and do not, make the league product. Interdependence and concerted activity are essential to the existence of that product: major league soccer, football, and the others. *Timken* and *Perma Life* are inapposite because, in those cases, the concerted activity condemned under the Sherman Act did not create the product; rather, it restrained competition in the sale of a product which depended not a whit upon joint action for its existence. Thus in *Timken* the Court doubted the legitimacy of the proclaimed joint venture because its "dominant purpose" "was to avoid all competition either among themselves or with others." 341 U.S. at 597-8, 71 S.Ct. at 974-75. The "dominant purpose" of sports league members' agreements among themselves is to make league sports pos-

sible. Similarly, *Perma Life*, citing *Timken*, says of the interrelated Midas corporate defendants that "the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities." 392 U.S. at 141-2, 88 S.Ct. at 1986. True enough: but the unique nature of a professional sports league lies in the fact that "separate entities" cannot produce its product.

I conclude that bearings and mufflers are so different from footballs and soccer balls that the NASL's argument, in effect, compares apples with oranges. *Timken* and *Perma Life* do not foreclose the NFL's single economic entity concept.

These considerations also serve to distinguish *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978). In the prior decision on preliminary injunction, I rejected on the papers then before me the NASL's contention of *per se* illegality and, following the sports league cases discussed *ante*, opted for the rule of reason as the standard by which the NFL's cross-ownership ban should be judged. 465 F.Supp. at 672-5. The rule of reason as articulated in *Professional Engineers* requires consideration of "whether the challenged agreement is one that promotes competition or one that suppresses competition." 435 U.S. at 691, 98 S.Ct. at 1365. In point of fact, the Court in *Professional Engineers* condemned as *per se* illegal an engineering society's canon of ethics prohibiting its members from submitting competitive bids for engineering services. Those services are rendered on an individual basis. Joint or concerted action is not necessary to make them available to the public. *Professional Engineers* does not foreclose the NFL's single economic entity defense, where concerted activity is necessary to

create the product *ab initio*,[19] and the competition between sports leagues in the identifiable markets does not involve any competition between the constituent members of the leagues.[20]

The parties discuss in their briefs the Supreme Court's more recent decision in *Broadcast Music, Inc.* v. *Columbia Broadcasting System, supra.* The case is interesting, but does not bear particularly closely on the one at bar. The relevant market was the licensing to television networks of performing rights to copyrighted musical compositions. CBS challenged the legality of blanket licenses issued to the networks at negotiated fees by ASCAP and BMI, organizations which represent individual composers to negotiate with and license users of copyrighted works, and detect unauthorized use. The Court, reversing the Second Circuit, held that the blanket license was not a *per se*, price-fixing violation of Sherman Act § 1, and remanded for further proceedings, including an assessment of the blanket license under the rule of reason. In point of fact, the Second Circuit on remand, 620 F.2d 930 (2d Cir. 1980), did not feel required to make a rule of reason analysis, since it affirmed District Judge Lasker's conclusion following trial, 400 F.Supp. 737 (S.D.N.Y. 1975), that CBS failed to prove the blanket license restrained competition at all.

---

[19] Cf. *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 23, 99 S.Ct. 1551, 1564, 60 L.Ed.2d 1 (1978):

> "Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all."

[20] Cf. *Smith* v. *Pro-Football, Inc., supra,* where the court of appeals was guided by the rule of reason as articulated in *Professional Engineers* in evaluating the legality of the NFL player selection system's restraints upon competition between the member teams for players. 593 F.2d at 1175 n.3 , 1183 n.43.

Appendix B

To the extent that *Broadcast Music* furnishes guidance on the question of the NFL's status as a single (and therefore non-conspiring) economic entity, it derives from the Court's flexible approach. Rejecting the *per se* rule, Justice White wrote that "easy labels do not always supply ready answers." 441 U.S. at 8, 99 S.Ct. at 1556. A comparable observation appears in *Smith* v. *Pro-Football, Inc., supra,* at 1182: "In antitrust law, as elsewhere, we must heed Justice Cardozo's warning to beware 'the tyranny of tags and tickets,'" quoting Cardozo, *Mr. Justice Holmes,* 44 Harv.L.Rev. 682, 688 (1931). The Court in *Broadcast Music* quoted with evident approval the statement of the Justice Department, in a prior ASCAP case, that "[t]he Sherman Act has always been discriminatingly applied in the light of economic realities." *Id.* at 14. An example is found in the Court's observation, quoted at n.19 *supra,* that joint ventures are not usually regarded as unlawful price-fixing schemes "where the agreement on price is necessary to market the product at all." The *Broadcast Music* Court, conceding that "[w]e have never examined a practice like this one before," *id.,* 441 U.S. at 10, 99 S.Ct. at 1557, gives a perceptive analysis of the blanket license:

> "This substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers, differentiates the blanket license from individual use licenses. The blanket license is composed of the individual compositions plus the aggregating service. *Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product.* The blanket license has certain unique characteristics: It allows the licensee immediate use of covered compositions, without the delay of prior individual negotations, and great flexibility in

> the choice of musical material. Many consumers clearly prefer the characteristics and cost advantages of this marketable package, and even small performing-rights societies that have occasionally arisen to compete with ASCAP and BMI have offered blanket licenses. *Thus, to the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material.* ASCAP, in short, made a market in which individual composers are inherently unable to compete fully effectively." *Id.* at 21-2 [99 S.Ct. at 1563-64]. (emphasis added; footnotes omitted).

In my judgment, the NFL's single economic entity concept finds some support in the Court's recognition that joint activity, inherently necessary to produce a marketable and recognizably different product, creates a single, "separate seller" of that product (the blanket license), notwithstanding the fact that the efforts of many individuals comprise the product. The blanket license in *Broadcast Music* may fairly be analogized to a professional sports league, whose product (NASL soccer, NFL football) is indeed, in the light of practical economic realities, "greater than the sum of its parts."

The Second Circuit, on remand in *Broadcast Music*, concluded that the networks could feasibly enter into direct licensing from individual composers. Therefore the alternative product of the blanket license, purchased by the networks solely because of convenience and preference, was not a *restraint* of trade; and the rule of reason had no office to perform. In the case at bar, no alternative product

exists. Richard Rodgers could compose, play, and license his own songs; but a professional sports team cannot play or market itself. The sports league's product can exist only as the result of joint effort. In that context, I conclude that there is no *combination* in restraint of trade; and so the rule of reason has no office to perform.

F. *Disposition of the NASL's Claims.*

On this analysis, we may recognize both the anticompetitive intent and effect of the NFL cross-ownership ban, and still find ourselves navigating outside Sherman Act waters. In the opinion on preliminary injunction, 465 F.Supp. at 677, I said:

> "It is difficult for defendants to deny any anticompetitive intent for the cross-ownership ban, in the face of Commissioner Rozelle's explanatory statement of June 28, 1978 to the NFL owners, which included the following discussion as a reason for the ban:
>
> > 'The NFL's success depends on fan interest and loyalty. The League competes with other major team sports for that interest and loyalty, as well as for gate receipts, television revenues, advertising dollars, and media coverage. Connections with NFL personnel may well enhance these competing team sports, both in fact and in the public's perception, at the expense of the NFL.' "

The NASL characterizes Rozelle's statement as a "smoking pistol." The difficulty is that in economic competition, not all firearms are illegal. The Sherman Act is concerned with the Gatling gun effect of several independent barrels, bound and firing together to restrain trade; or, at the very least, a

double-barrelled shotgun. The single-barrelled pistol is not the happiest analogy for the Sherman Act plaintiff.

The anticompetitive intent of the cross-ownership ban is not an illegal intent, because the NFL, which competes against other professional sports leagues as a simple economic entity, seeks to promulgate the ban in furtherance of that entity's marketplace efficiency. The ban is an exercise in entity housekeeping; and as a matter of economic reality, it is a one family, fully detached house. I need not further mix the metaphors. I have found that the cross-ownership ban has a conceded anticompetitive intent, and, in its impact on the NASL, will probably have an anticompetitive effect. I conclude that, in the circumstances of the case, neither intent nor effect falls within the Sherman Act.

While this case, in its application of Sherman Act principles to competition between professional sports leagues is, one of first impression, the conclusion I have reached is supported, at least to my mind, by common sense. Trial judges customarily instruct jurors to take their common sense with them into the jury room. The judge, as fact finder in chambers, may usefully follow that advice.

Professional sports leagues compete with each other. The members of one league, who sustain and support that entity, wish to exclude from their ranks individuals who, directly or through their families, sustain and support a competing league. A man of reasonable common sense, unschooled in antitrust law, would have difficulty understanding why they could not do so. It is not necessary to resort to Dickensian invective [21] to conclude that the law does not require what common sense would surely condemn. To hold otherwise would be to disregard the Second Circuit's recent warning:

---

[21] "If the law supposes that," said Mr. Bumble . . . "the law is a ass, a idiot." *Oliver Twist*, ch. 51.

"We must always be mindful lest the Sherman Act be invoked perversely in favor of those who seek protection against the rigors of competition. *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979), per Kaufman, Ch.J., *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980). No Sherman Act violation appears in this case.

Having held that the NFL's acts do not implicate the Sherman Act, no question arises under the rule of reason. If an appellate court should take a different view, that issue may be addressed on remand, on the present record, as well as plaintiffs' claims for damages. No present opinion as to those questions is intimated.

Plaintiffs' claims under the Clayton Act will accordingly be dismissed.

G. *The NFL's Counterclaims.*

The NFL has pleaded, and urged at trial, two counterclaims against the NASL and its member teams. They are pleaded in the alternative. Both seek injunctive relief.

The first counterclaim,[22] consistent with the NFL's perception of professional sports leagues as single economic entities, views the presently existing cross-ownership as in the nature of interlocking directorates, illegal under a theory analogous to the Clayton Act, § 8 prohibition against corporate interlocking directorates, 15 U.S.C. § 19. The NFL prays for a permanent injunction against the NASL and its member clubs, "barring simultaneous ownership by any individual, group of individuals or business entity of a con-

[22] The manner in which the NFL's counterclaims were pleaded in the answer was amended at trial to conform to their presentation in the pre-trial order and brief. Tr. 44-48.

trolling interest in both an NASL club and an NFL club." NFL Proposed Order, ¶ B.

Alternatively, the NFL adopts the NASL's view of the league as a collection of competing team owners. The NFL alleges by way of counterclaim that the member clubs and the league commissioner have conspired "to raise, maintain and stabilize NASL franchise prices," NFL Proposed Conclusion of Law 174, which should be enjoined.

Neither counterclaim has substance. As to the first counterclaim, assuming *arguendo* that the NFL and NASL cross-owners should be analogized to Clayton Act § 8 interlocking directors, the NFL is entitled to injunctive relief only if it makes the requisite showing of "threatened loss or damage" under § 16, 15 U.S.C. § 26. A party seeking Clayton Act § 16 injunctive relief must demonstrate "a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130, 89 S.Ct. 1562, 1580, 23 L.Ed.2d 129 (1969). The holding in *Zenith Radio* has been interpreted as teaching "that not only must there be a threat of injury, but that the threat must be significant for injunctive relief to be granted." *Coliseum I, supra*, at 468 F.Supp. 159. There is no evidence in the record from which I could find that NFL is facing a significant threat of injury from a cross-ownership ban which it has tolerated for many years.

Even if such a significant threat were demonstrated, the NFL does not require the intervention of a court of equity to remedy the situation. Precisely because the two competing leagues should be regarded as single economic entities, as the NFL has contended and the Court has held, a complete remedy lies within the NFL's own hands. Passage and enforcement of the NFL's cross-ownership ban is clearly

sufficient to remedy whatever threat the NFL perceives in cross-ownership. An injunction would be mere surplusage. Courts of equity do not expend their energies in unnecessary exercises.

The Clayton Act § 16 injunctive relief sought by the alternative counterclaim also fails for lack of proof of any actual or threatened damages. The NASL are charged with conspiring to inflate or stabilize the price of NASL franchises. But there is no evidence whatsoever that any of the NFL defendants had any interest in acquiring an NASL franchise, and suffered damages in consequence. On the contrary: the NFL adduced at trial considerable evidence for the proposition that the last thing an NFL owner wants is an NASL franchise.

The counterclaims will be dismissed on the merits.

H. *Claims for Attorneys' Fees.*

Both sides claim attorneys' fees. The claims are denied.

"In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 247, 95 S.Ct. 1612, 1616, 44 L.Ed.2d 141 (1975). Exceptions to that rule may be created by statute; or, in the absence of statutory prohibition, by exercise of the court's inherent equitable powers, if particular circumstances appear. Those circumstances, summarized in *Alyeska* at 257-259, 95 S.Ct. at 1621-22, include the recovery of attorneys' fees incurred by a party whose suit creates a fund for the benefit of others; fees generated by the willful disobedience of a court order, as part of the fine to be levied upon the defendant; or when the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons," citing *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116, 129, 94 S.Ct. 2157, 2165, 40 L.Ed.2d 703 (1974).

Appendix B

In antitrust law, § 4 of the Clayton Act, 15 U.S.C. § 15, provides that a person "injured in his business or property by reason of anything forbidden in the antitrust laws" may sue and recover treble damages, "including a reasonable attorney's fee." Section 16 of the Clayton Act, 15 U.S.C. § 26, was amended in 1976 so as to provide that in an action brought under the antitrust laws for injunctive relief, the court shall award a reasonable attorney's fee, as part of costs, in any action "in which the plaintiff substantially prevails . . ."

The typical claim for attorneys' fees in an antitrust case is made by a successful plaintiff; however, an award will lie in favor of a defendant who successfully prosecutes a counterclaim sounding in antitrust. *Locklin* v. *Day-Glo Color Corp.*, 429 F.2d 873 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020, 91 S.Ct. 582, 27 L.Ed.2d 632 (1971). A successful antitrust defendant may also tax a statutory bill of costs, as the prevailing party under Rule 54(d), F.R.Civ.P. *In re Nissan Antitrust Litigation*, 577 F.2d 910, 918 (5th Cir. 1978).

The pertinent provisions of the antitrust laws require success on an affirmative claim, as a condition precedent to the award of attorneys' fees. The defendant, even if successful in resisting plaintiffs' claim, has no such entitlement. The Third Circuit held in *Byram Concretanks, Inc.* v. *Warren Concrete Products Co.*, 374 F.2d 649, 651 (3rd Cir. 1967), that "in the absence of specific legislative authorization attorneys' fees may not be awarded to defendants in private antitrust litigation," a holding cited by the Supreme Court with apparent approval in *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 419 n.13 98 S.Ct. 694, 699, n.13, 54 L.Ed.2d 648 (1978).

In the case at bar, the plaintiffs' antitrust claims will be dismissed, as will the defendants' counterclaims. In these circumstances, there is no statutory entitlement to attorneys' fees.

While at least one court has suggested that an equitable claim for attorneys' fees would lie in favor of a successful antitrust defendant, *Juneau Square Corp.* v. *First Wisconsin National Bank of Milawukee*, 435 F.Supp. 1307, 1327 (E.D.Wis.1977), none of the circumstances summarized in *Alyeska, supra*, is present here. I have rejected the claims and counterclaims on their merits, but it cannot be said that any of the claims were asserted or prosecuted in bad faith.

In these circumstances, attorneys' fees will not be awarded to any party. Nor will costs be awarded, the plaintiffs' claims and the defendants' counterclaims all having been rejected on their merits. *Srybnik* v. *Epstein*, 230 F.2d 683, 686 (2d Cir. 1956).

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and subject matter of this action.

2. Plaintiffs have failed to prove that defendants conspired to restrain trade in any identifiable market of trade or commerce, in violation of § 1 of the Sherman Act, 15 U.S.C. § 1.

3. The acts of the defendants revealed by the evidence are the acts of a single economic entity, and as such fall outside the boundaries of the antitrust laws.

4. Therefore the NFL cross-ownership ban cannot be regarded as a group boycott, illegal *per se;* and no occasion arises for evaluation of the ban under the rule of reason.

5. The defendants' counterclaims are without merit.

CONCLUSION

Judgment will be entered dissolving the preliminary injunction, and dismissing the complaint and counterclaims with prejudice, the parties to bear their own costs and attorneys' fees.

Since the by-law proposed in 1978 allowed for time for NFL owners to divest themselves of other sports interest before the sanctions for non-compliance came into effect, the judgment vacating the preliminary injunction will provide that any NFL by-law or constitutional amendment implementing a cross-ownership ban must include a time for compliance, from the effective date of the amendment, at least as long as the period contemplated in the October, 1978 proposal.

In view of the importance of the legal issues raised, and the adverse effect upon plaintiffs if defendants were now to promulgate a cross-ownership ban, the judgment dissolving the preliminary injunction will be stayed, and the injunction continued, pending appeal, if any. F.R.Civ.P. 62(c).

Settle judgment on ten (10) days' notice.

APPENDIX C

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Nos. 80-9153, 81-7003

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the day of , one thousand nine hundred and eighty-two.

Filed: March 17, 1982

NORTH AMERICAN SOCCER LEAGUE, *et al.*,

Plaintiffs-Appellants-Cross-Appellees,

v.

NATIONAL FOOTBALL LEAGUE, *et al.*,

Defendants-Appellees-Cross-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellee-cross-appellant, National Football League,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

Appendix C

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ A. DANIEL FUSARO
A. Daniel Fusaro
Clerk

By /s/ FRANCIS X. GINDHART
Chief Deputy Clerk

No. 81-2296

Office - Supreme Court, U.S.
FILED
15 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

NATIONAL FOOTBALL LEAGUE; SAN FRANCISCO 49ers; OAKLAND RAIDERS; NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC.; MINNESOTA VIKINGS FOOTBALL CLUB, INC.; THE FIVE SMITHS, INC.; BALTIMORE FOOTBALL, INC.; HIGHWOOD SERVICE, INC.; CHICAGO BEARS FOOTBALL CLUB, INC.; CINCINNATI BENGALS, INC.; CLEVELAND BROWNS, INC.; DALLAS COWBOYS FOOTBALL CLUB, INC.; EMPIRE SPORTS, INC.; THE DETROIT LIONS, INC.; GREEN BAY PACKERS, INC.; HOUSTON OILERS, INC.; LOS ANGELES RAMS FOOTBALL CO.; NEW ORLEANS SAINTS; NEW YORK FOOTBALL GIANTS, INC.; NEW YORK JETS FOOTBALL CLUB, INC.; LEONARD H. TOSE, d/b/a PHILADELPHIA EAGLES FOOTBALL CLUB; PITTSBURGH STEELERS SPORTS; CHARGERS FOOTBALL COMPANY; CHICAGO CARDINALS FOOTBALL CLUB; PRO-FOOTBALL, INC.; and TAMPA BAY BUCCANEERS, INC.,

Petitioners,

against

NORTH AMERICAN SOCCER LEAGUE; ORANGE COUNTY PRO SOCCER; CHICAGO WORLD SOCCER INC.; CARIBOUS OF COLORADO, INC.; MICHIGAN SOCCER, LIMITED; HOUSTON PROFESSIONAL SOCCER CLUB, LTD.; AZTEC PROFESSIONAL SOCCER CLUB; MEMPHIS SOCCER CLUB, INC.; MINNESOTA SOCCER, INC.; LIPTON PROFESSIONAL SOCCER, INC.; COSMOS SOCCER CLUB, INC.; OAKLAND STOMPERS, LTD.; PHILADELPHIA SOCCER ASSOCIATES; OREGON SOCCER, INC.; BLUE & GOLD, LTD.; SAN DIEGO PROFESSIONAL SOCCER CLUB; SAN JOSE EARTHQUAKES, LIMITED; TAMPA BAY SOCCER CLUB, INC.; PRO SOCCER, LTD.; TULSA ROUGHNECKS, LTD.; VANCOUVER PROFESSIONAL SOCCER CLUB, LTD.; and WASHINGTON DIPLOMATS SOCCER CLUB, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

Of Counsel:
JAMES W. QUINN
IRWIN H. WARREN
JEFFREY L. KESSLER
KENNETH L. STEINTHAL
JEFFREY S. KLEIN

WEIL, GOTSHAL & MANGES

IRA M. MILLSTEIN
Attorney for Respondents
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Questions Presented

1. Is there any basis for this Court to grant *certiorari* here, where the Court of Appeals applied classic antitrust principles to declare unlawful an agreement amongst the individual owners of 25 professional sports teams, entered into with a concededly anticompetitive purpose and effect, to "... prohibit [themselves] from making or retaining any capital investment in any member of another league of professional sports teams (in this case the NASL) . . ." (P. App. A 2a, 670 F.2d at 1250)?[1]

2. Should this Court grant *certiorari* to entertain petitioners' request that this Court upset at least twenty-five years of precedent and now legislate, in the words of the Court of Appeals, a "loophole" (P. App. A 18a, 670 F.2d at 1257) from Section 1 of the Sherman Act which would permit professional sports team owners, as distinguished from all other joint venturers, to escape antitrust responsibility for any group restraints entered into by them?

---

1. References to the Second Circuit's opinion, contained in Appendix A of the petition, are denoted by "P. App. A——"; references to the District Court opinion, contained in Appendix B of the petition, are denoted by "P. App. B——". All citations to the petition are denoted by "Pet. ——". The Second Circuit opinion is reported at 670 F.2d 1249; the District Court opinion is reported at 505 F. Supp. 659.

TABLE OF CONTENTS

	PAGE
Questions Presented	1
Statement of the Case	2
The Facts	3
Prior Proceedings	8
Reasons for Denying the Writ	9
I—THE APPLICATION OF SECTION 1 OF THE SHERMAN ACT TO THE AGREEMENTS OF INDEPENDENT OWNERS OF PROFESSIONAL SPORTS TEAMS PRESENTS NO CONFLICT OR QUESTION WARRANTING REVIEW BY THIS COURT	9
II—THE SECOND CIRCUIT'S CONDEMNATION OF THE CROSS-OWNERSHIP BAN UNDER THE RULE OF REASON WAS CONSISTENT WITH, AND MANDATED BY, PRIOR DECISIONS OF THIS COURT	17
A. The Court of Appeals Properly Dealt With the Market Issue	19
B. The Court of Appeals Correctly Considered the Availability of Less Restrictive Alternatives in Evaluating the Cross-Ownership Ban Under the Rule of Reason	23
III—THE NFL PETITIONERS' REQUEST FOR IMMUNITY FROM SECTION 1 OF THE SHERMAN ACT SHOULD BE DIRECTED TO CONGRESS, NOT TO THIS COURT	24
CONCLUSION	29

PAGE

Appendix A: Excerpt from Respondents' Court of Appeals Reply Brief (Pages 14-15) 1a

Appendix B: Statement of Abbott B. Lipsky, Jr., Deputy Assistant Attorney General, Antitrust Division, to the United States House of Representatives, Committee on the Judiciary, Subcommittee on Monopolies and Commercial Law, Concerning Professional Sports and the Antitrust Laws, July 14, 1981 ..... 3a

Appendix C: *NFL Fails to Get Antitrust Bill Introduced,* The Washington Post, Apr. 2, 1982, at D1, col. 1 ..... 9a

Appendix D: *NFL Presses for Antitrust Exemption,* N.Y. Times, Apr. 4, 1982, Sec. 5 at 8, col. 3 ..... 13a

Appendix E: Statement of Parties in Interest Pursuant to Rule 28.1 ..... 16a

TABLE OF AUTHORITIES

PAGE

Cases:

American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3rd Cir. 1975) 24
Arizona v. Maricopa County Medical Society, —— U.S. ——, 50 U.S.L.W. 4687 (1982) 25
Associated Press v. United States, 326 U.S. 1 (1945) 10, 16, 22, 23

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (1979) *cert. denied*, 444 U.S. 1093 (1980) 24
Bowman v. NFL, 402 F. Supp. 754 (D. Minn. 1975) 10, 11
Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979) 16
Brown Shoe Company v. United States, 370 U.S. 294 (1962) 19

Chicago Board of Trade v. United States, 246 U.S. 231 (1918) 10
Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) 18
Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934 (5th Cir. 1975) 23

Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971), *stay vacated sub nom.*, Haywood v. NBA, 401 U.S. 1204 (1971) 24
Diamond v. Chakrabarty, 447 U.S. 303 (1980) 27

Far Eastern Coconut Co. v. Sun Ripe Coconut Corp., 1979-2 Trade Cas. ¶ 62,878 (E.D.N.Y. 1979) 22
Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941) 25, 26
Federal Baseball Club v. National League, 259 U.S. 200 (1922) 9
Flood v. Kuhn, 407 U.S. 258 (1972) 9, 28

PAGE

Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978) 9
Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977) 23

Kapp v. NFL, 390 F. Supp. 73 (N.D. Cal. 1974), *appeal vacated*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979) 10, 11

Levin v. NBA, 385 F. Supp. 149 (S.D.N.Y. 1974) 11, 13
Linseman v. WHA, 439 F. Supp. 1315 (D. Conn. 1977) 10, 23
Los Angeles Memorial Coliseum Commission v. NFL, 468 F. Supp. 154 (C.D. Cal. 1979) 10, 11
Los Angeles Memorial Coliseum Commission v. NFL, 484 F. Supp. 1274 (C.D. Cal.), *rev'd on other grounds*, 634 F.2d 1197 (9th Cir. 1980) 9, 10
Los Angeles Memorial Coliseum Commission v. NFL, 519 F. Supp. 581 (C.D. Cal. 1981) 9, 12

McLain v. Real Estate Board, 444 U.S. 232 (1980) 18
Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) 9, 10, 23
Molinas v. NBA, 190 F. Supp. 241 (S.D.N.Y. 1961) 13

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) 17, 18, 25
Neeld v. NHL, 594 F.2d 1297 (9th Cir. 1979) 13
North American Soccer League v. National Football League, 505 F. Supp. 659 (S.D.N.Y. 1980), *rev'd*, 670 F.2d 1249 (2d Cir. 1982) ..... *passim*

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) 10, 16
Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972) 10

PAGE

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962) 18

Radovich v. NFL, 352 U.S. 445 (1957) 9, 10
Robertson v. NBA, 389 F. Supp. 867 (S.D.N.Y. 1975) 10

Sandura Co. v. FTC, 339 F.2d 847 (6th Cir. 1964) 23
San Francisco Seals, Ltd. v. NHL, 379 F. Supp. 966 (C.D. Cal. 1974) 11, 13
Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) 23
Silver v. New York Stock Exchange, 373 U.S. 341 (1963) 10, 16, 23
Smith v. Pro-Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978) 9, 10, 23

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 101 S. Ct. 2061 (1981) 27
Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) 18
Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) 10, 16

United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899) 23
United States v. Columbia Steel Co., 334 U.S. 495 (1948) 18
United States v. Insurance Board of Cleveland, 188 F. Supp. 949 (N.D. Ohio 1960) 22
United States v. Topco Associates, Inc., 405 U.S. 596 (1972) 25, 26
United States v. United States Gypsum Co., 438 U.S. 422 (1978) 18

Worthen Bank & Trust Co. v. National BankAmericard, Inc., 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974) 23

PAGE

Statutes:

15 U.S.C. § 1 ..... *passim*
15 U.S.C. §§ 1291-1295 28

Other Authorities:

NFL TV Pact $2 Billion, N.Y. Times, Mar. 23, 1982 at D23, col. 6 4
NFL Presses for Antitrust Exemption, N.Y. Times, Apr. 4, 1982, Sec. 5 at 8, col. 3 28
NFL Fails to Get Antitrust Bill Introduced, The Washington Post, Apr. 2, 1982, at D1, col. 1 28
Statement of Abbott B. Lipsky, Jr., Deputy Assistant Attorney General, Antitrust Division, to the United States House of Representatives, Committee on the Judiciary, Subcommittee on Monopolies and Commercial Law, Concerning Professional Sports and the Antitrust Laws, July 14, 1981 13
J. C. Weistart & C. H. Lowell, *The Law of Sports* (1979) 17

IN THE

Supreme Court of the United States

October Term, 1981

No. 81-2296

NATIONAL FOOTBALL LEAGUE; SAN FRANCISCO 49ers; OAKLAND RAIDERS; NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC.; MINNESOTA VIKINGS FOOTBALL CLUB, INC.; THE FIVE SMITHS, INC.; BALTIMORE FOOTBALL, INC.; HIGHWOOD SERVICE, INC.; CHICAGO BEARS FOOTBALL CLUB, INC.; CINCINNATI BENGALS, INC.; CLEVELAND BROWNS, INC.; DALLAS COWBOYS FOOTBALL CLUB, INC.; EMPIRE SPORTS, INC.; THE DETROIT LIONS, INC.; GREEN BAY PACKERS, INC.; HOUSTON OILERS, INC.; LOS ANGELES RAMS FOOTBALL CO.; NEW ORLEANS SAINTS; NEW YORK FOOTBALL GIANTS, INC.; NEW YORK JETS FOOTBALL CLUB, INC.; LEONARD H. TOSE, d/b/a PHILADELPHIA EAGLES FOOTBALL CLUB; PITTSBURGH STEELERS SPORTS; CHARGERS FOOTBALL COMPANY; CHICAGO CARDINALS FOOTBALL CLUB; PRO-FOOTBALL, INC.; and TAMPA BAY BUCCANEERS, INC.,

Petitioners,

against

NORTH AMERICAN SOCCER LEAGUE; ORANGE COUNTY PRO SOCCER; CHICAGO WORLD SOCCER INC.; CARIBOUS OF COLORADO, INC.; MICHIGAN SOCCER, LIMITED; HOUSTON PROFESSIONAL SOCCER CLUB, LTD; AZTEC PROFESSIONAL SOCCER CLUB; MEMPHIS SOCCER CLUB, INC.; MINNESOTA SOCCER, INC.; LIPTON PROFESSIONAL SOCCER, INC.; COSMOS SOCCER CLUB, INC.; OAKLAND STOMPERS, LTD.; PHILADELPHIA SOCCER ASSOCIATES; OREGON SOCCER, INC.; BLUE & GOLD, LTD.; SAN DIEGO PROFESSIONAL SOCCER CLUB; SAN JOSE EARTHQUAKES, LIMITED; TAMPA BAY SOCCER CLUB, INC.; PRO SOCCER, LTD.; TULSA ROUGHNECKS, LTD.; VANCOUVER PROFESSIONAL SOCCER CLUB, LTD.; and WASHINGTON DIPLOMATS SOCCER CLUB, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

Statement of the Case

The Court of Appeals correctly decided the legal issues in this case: First, was an agreement among the petitioners, the National Football League ("NFL") and 25 of its separately owned and operated member clubs (collectively referred to herein as the "NFL petitioners"), to prohibit themselves from providing any sports ownership capital and skill to other sports teams, subject to being tested under Section 1 of the Sherman Act?[2] The Second Circuit, reversing the District Court, answered "yes". Then, applying traditional rule of reason principles to the particular facts found below, the Court of Appeals determined that a violation of Section 1 had in fact occurred. In so doing, that Court relied upon the District Court's factual finding that the challenged agreement was severely anticompetitive in both purpose and effect—a finding nowhere mentioned in the petition before this Court:

> As the district court found, the cross-ownership ban "has a conceded anticompetitive intent and, in its impact on the NASL, will probably have an anticompetitive effect." 505 F. Supp. at 689 [P. App. B 96a].

P. App. A 13a, 670 F.2d at 1255.

That Section 1 of the Sherman Act is applicable to businessmen in commerce, absent some express exemption, and was properly applied to the concededly anticompetitive agreement at issue in this case, hardly seems debatable. The only real question presented by the petition to this Court is whether ultimately to grant the request of these multi-millionaire NFL team owners for that express exemption from Section 1 on the theory that "[t]he operating principles of such lawful ventures [*i.e.*, sports leagues], developed by agreement among the joint venturers themselves, should not be subject to *ad hoc* judicial review as

2. Section 1 of the Sherman Act is quoted at p. 2 of the petition.

though they were agreements and conspiracies among economically independent persons" (Pet. 11). This quest for Section 1 immunity has consistently been denied them by this Court, a dozen lower courts and the United States Congress.

The NFL petitioners can continue their search for legislative immunity in Congress, if so advised, but this Court should not grant *certiorari* to review long-settled antitrust principles.

The Facts

In October 1978, representatives of 28 independent entities (each entity being a separately-owned NFL team) were about to meet together in the classic "hotel room" to agree in writing (in a proposed amendment to the NFL Constitution, hereinafter referred to as the "cross-ownership ban") that: (i) no NFL team owners (or members of their families) could invest in a major professional sports team which competed with NFL teams; and (ii) if any such NFL team owner had an existing investment in such a competing professional sports team, such investment had to be divested by a date certain or that owner would be subject to draconian sanctions (P. App. A 2a, 11a-13a, 670 F.2d at 1250, 1254-55; P. App. B 30a-31a, 505 F. Supp. at 661-62).

This action was brought by the North American Soccer League ("NASL") and certain of its member clubs (collectively referred to herein as the "NASL respondents") against the NFL petitioners to enjoin continuation and/or enactment of the cross-ownership ban, including its divestiture requirement directed at the NASL respondents (*see infra* at 6-7), and to recover damages.

The background facts found below, as to which there is little dispute, are as follows. The NFL and NASL are both major professional sports leagues operating in the

United States (and, in the case of the NASL, Canada). The ultimate objective of both leagues and their individual member teams is to promote their respective sports and to generate interest and revenues among ticket-buying fans, advertisers and television broadcasters (P. App. A 3a, 670 F.2d at 1251). Over the last 15 years, since the inception of the NASL in 1968, competition between the NFL and NASL for the interest of, and revenues to be derived from, these fans, advertisers and broadcasters has increased substantially on both a team-versus-team and league-versus-league basis (P. App. A 6a-7a, 670 F.2d at 1252).[3]

However, there is no comparison between the relative economic strength and stability of the teams in the two leagues. The NFL petitioners, by their own admission, are the preeminent and most lucrative professional sports teams in the United States—witness their recently reported $2 billion television package.[4] By contrast, the NASL, which is the youngest and "weakest" (P. App. A 7a, 670

3. As the Second Circuit, based on the District Court's factual findings, summarized:

> NASL teams have become increasingly more effective competitors of the NFL teams. The two sports are somewhat similar. Their seasons substantially overlap. The teams have franchises from their respective leagues in the same locations and frequently use the same stadia. An increasing, although small, percentage of the public are switching their interest as fans and TV viewers from professional football to professional soccer, threatening to reduce revenue which NFL teams derive from gate receipts and TV broadcast rights. Competition between NFL and NASL teams has not only increased on an inter-league basis but also between individual NFL and NASL teams. On the league front both organizations compete for a greater share of finite national and regional TV broadcast and advertising revenues. At the local level NFL teams compete against NASL teams for greater fan support, gate attendance, and local broadcast revenues.

P. App. A 6a-7a, 670 F.2d at 1252.

4. *NFL TV Pact $2 Billion*, N.Y. Times, Mar. 23, 1982, at D23, col. 6.

F.2d at 1252-53) of the five major professional team sports leagues, "is struggling to achieve wider popularity and with it greater revenues" (P. App. A 6a, 670 F.2d at 1252). "To this point, [the NASL respondents have been] financially unsuccessful" (P. App. A 7a, 670 F.2d at 1252).

The NASL's uphill struggle continues and is both reflected by and has resulted in a substantial turnover in its franchise ownership.[5] "Consequently, the risk of investing in an NASL team is considerably greater than that of investing in the NFL" (P. App. A 6a, 670 F.2d at 1252). The high-risk nature of investment in a professional soccer team, together with the other special characteristics of sports team ownership, led both courts below to conclude that, for professional sports teams in general and the NASL in particular, "the market for and availability of capital investment is limited" (P. App. A 7a, 670 F.2d at 1253).[6] The history of sports team ownership, and particularly the massive trial evidence of the experience of NFL and NASL teams in seeking new sources of sports ownership capital and skill, further revealed that within this limited market, "individuals with experience in owning and operating sports teams tend to be the most sought-after potential owners" (P. App. A 8a, 670 F.2d at 1253). The NFL petitioners' cross-ownership ban, of course, is a naked restraint impacting directly upon this limited mar-

5. For example, just between the trial and argument of the appeal below, 8 of the NASL's 24 teams folded (P. App. A 7a, 670 F.2d at 1253). Two more have since collapsed.

6. In the words of the Second Circuit:

> In short, while capital may be fungible in other businesses, it is not fungible in the business of producing major league professional sports. Regardless of the risk involved in the venture, which may vary greatly from league to league, league members look not merely for money but for a compatible fellow owner, preferably having entrepreneurial sports skill, with whom the other members can operate their joint business enterprise.

P. App. A 8a, 670 F.2d at 1253.

ket, specifically restricting the investment decisions of the most "sought-after" portion thereof.[7]

The NFL team owners' petition is notable for its omission of several critical facts found below which formed the lynchpin of the Court of Appeals' opinion. The most important omission is the failure even to acknowledge that both lower courts had no trouble concluding that the cross-ownership ban was manifestly anticompetitive both in its purpose and in its effect on the NASL respondents (P. App. A 9a, 13a, 670 F.2d at 1254-55; P. App. B 96a, 505 F.Supp. at 689).

The history of the cross-ownership ban, evolving as it did from informal resolutions to a full-blown proposal to amend the NFL Constitution, is summarized in the opinion below (P. App. A 10a-13a, 670 F.2d at 1254-55). Suffice it to say here that the purpose of the ban was not only generally to deprive all other major professional sports teams of the capital and skill of NFL owners, but also was specifically directed at what was perceived by NFL owners to be a growing competitive challenge from NASL teams (P. App. A 13a, 670 F.2d at 1255; P. App. B 52a, 505 F.Supp. at 670). The NFL ban was intended to force two of the most important and respected owners in the NASL—Lamar Hunt (owner of the Dallas and, thereafter, Tampa Bay NASL teams and Kansas City NFL team) and the Robbie family (owners of the Fort Lauderdale NASL team and Miami NFL team)—to rid themeselves of their NASL

7. Although the NFL petitioners continue to insist that "capital is fungible" for sports team ownership, and erroneously state that the NASL respondents conceded that point (Pet. 19 n.11), it was, in fact, the NASL respondents' contrary position and proof that led the courts below to conclude that a limited market for sports ownership capital and skill exists—a factual finding that the NFL petitioners cannot contest before this Court. *Compare* the *full text* of Respondents' Court of Appeals Reply Brief, at 14 (attached hereto as Appendix A), *with* the out-of-context excerpt quoted by the NFL petitioners (Pet. 19 n.11).

franchises, and to prevent other NFL owners—the most successful professional team sports entrepreneurs in the United States—from ever again investing in an NASL team. In the Second Circuit's words:

> The purpose of the ban was to weaken the NASL and its member teams so that they could not compete as effectively against the stronger, more mature and lucrative NFL teams as they might be able to do with the aid of capital investment by NFL team owners.[8]

The other critical fact—again found by both lower courts and wholly ignored by the NFL petitioners—is that the NFL is comprised of 28 individual teams, each of which is a "separately owned, discrete legal entity which does not share its expenses, capital expenditures or profits with other [NFL] members . . . [and] derives separate revenues . . . which are not shared with other members" (P. App. A 5a, 670 F.2d at 1252; P. App. B 74a, 505 F.Supp. at 679-80). Thus, while NFL members participate jointly in many league matters, like members of all the other major professional team sports leagues, "[t]he NFL teams are separate economic entities engaged in a joint venture" (P. App. A 5a, 670 F.2d at 1252)—that joint venture, of course, being the league itself.

8. P. App. A 13a, 670 F.2d at 1255. The importance of NFL cross-owners to the NASL respondents was described in detail by the District Court:

> The presence of Hunt and the Robbie family as NASL owners has been of significant assistance to the league in attracting additional owners and capital, and in creating in the eyes of the media and the public an aura of stability and credibility for the NASL. Their departure . . . would have a significantly adverse effect upon the NASL.

P. App. B 48a, 505 F.Supp. at 668 (*quoted with approval at* P. App. A 9a, 670 F.2d at 1254).

Prior Proceedings

On these critical facts, there was no disagreement between the District and Circuit Courts below. Yet, the District Court, rejecting more than two decades of sports antitrust precedent, and more than 90 years of antitrust principles, ruled that the NFL petitioners should be regarded as a "single economic entity," rendering Section 1 of the Sherman Act inapplicable since it is limited to agreements among a plurality of actors (P. App. A 14a, 670 F.2d at 1255-56; P. App. B 85a-86a, 95a, 505 F.Supp. at 685, 688). Resting its decision on the "single economic entity" concept, the District Court erroneously concluded that "neither [the anticompetitive] intent nor effect [of the cross-ownership ban] falls within the Sherman Act" (P. App. B 96a, 505 F.Supp. at 689).

The Court of Appeals reversed, holding that the NFL petitioners are not entitled to any judicially-created special exemption from the antitrust laws and are, like all other businessmen, subject to Section 1 of the Sherman Act (P. App. A 16a-18a, 670 F.2d at 1256-58). Declaring that the cross-ownership ban is plainly subject to scrutiny under the rule of reason (P. App. A 21a, 670 F.2d at 1259), the Court of Appeals further concluded that the ban constitutes a violation of Section 1, since the uncontestable anticompetitive intent and effect of the ban far outweigh any supposed procompetitive benefits thereof (P. App. A 22a-27a, 670 F.2d at 1259-61).[9]

9. The NFL petitioners' subsequent request for a rehearing *en banc* was denied by the Second Circuit (P. App. C).

REASONS FOR DENYING THE WRIT

I

THE APPLICATION OF SECTION 1 OF THE SHERMAN ACT TO THE AGREEMENTS OF INDEPENDENT OWNERS OF PROFESSIONAL SPORTS TEAMS PRESENTS NO CONFLICT OR QUESTION WARRANTING REVIEW BY THIS COURT.

A review on writ of *certiorari* should be granted "only when there are special and important reasons therefor," such as where the decision presents a conflict within the Circuit Courts, a conflict with prior decisions of this Court, or "an important question of federal law which ha[s] not been, but should be, settled by this Court" (Rule 17, Supreme Court Rules).

None of these considerations warranting review on *certiorari* is present here. The reasons are clear: with the anomalous exception of baseball,[10] this Court, and all the other federal courts which have had an opportunity to do so, have uniformly applied the basic strictures of Section 1 of the Sherman Act to agreements among the members of professional sports leagues, including specifically the NFL petitioners,[11] on numerous occasions:

10. Unlike the other professional sports, professional baseball enjoys a long-standing, and concededly anomalous, immunity from application of the antitrust laws. *Flood* v. *Kuhn*, 407 U.S. 258 (1972); *Federal Baseball Club* v. *National League*, 259 U.S. 200 (1922).

11. *See, e.g., Radovich* v. *NFL*, 352 U.S. 445 (1957); *Smith* v. *Pro-Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Mackey* v. *NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Los Angeles Memorial Coliseum Commission* v. *NFL* ("Coliseum III"), 519 F. Supp. 851 (C.D. Cal. 1981); *Los Angeles Memorial Coliseum Commission* v.

(footnote continued on next page)

As the Supreme Court long ago recognized, the Sherman Act by its terms applies to "*every*" combination or agreement concerning trade, not just certain types. *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918). The theory that a combination of actors can gain exemption from §1 of the Sherman Act by acting as a "joint venture" has repeatedly been rejected by the Supreme Court and the Sherman Act has been held applicable to professional sports teams by numerous lesser federal courts. *See, e.g., Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42, 88 S.Ct. 1981, 1985-86, 20 L.Ed.2d 98 (1968); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 598, 71 S.Ct. 971, 974, 95 L.Ed. 1199 (1951); *Radovich* v. *National Football League*, 352 U.S. 445, 449-52, 77 S.Ct. 390, 392-94, 1 L.Ed.2d 456 (1957); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963); *Associated Press* v. *United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945); *Linseman* v. *World Hockey Association*, 439 F.Supp. 1315 (D. Conn. 1977); *Robertson* v. *National Basketball Association*, 389 F.Supp. 867 (S.D.N.Y. 1975); *Philadelphia World Hockey Club Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F.Supp. 462 (E.D. Pa. 1972); *Smith* v. *Pro-Football, Inc.*, 593 F.2d 1173 (D.C.Cir. 1978); *Mackey* v. *NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. denied*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977); *Los Angeles Memorial Coliseum Commission* v. *NFL* ("Coliseum II"), 484 F.Supp. 1274 (C.D. Cal.), *rev'd on other*

NFL ("Coliseum II"), 484 F. Supp. 1274 (C.D. Cal.), *rev'd on other grounds*, 634 F.2d 1197 (9th Cir 1980); *Los Angeles Memorial Coliseum Commission* v. *NFL* ("Coliseum I"), 468 F. Supp. 154 (C.D. Cal. 1979); *Bowman* v. *NFL*, 402 F. Supp. 754 (D. Minn. 1975); *Kapp* v. *NFL*, 390 F. Supp. 73 (N.D. Cal. 1974), *appeal vacated*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979) (hereinafter collectively referred to as the "*NFL Petitioners' Antitrust Liability Cases*").

grounds, 634 F.2d 1197 (9th Cir. 1980); *Los Angeles Memorial Coliseum* v. *NFL* ("Coliseum I"), 468 F.Supp. 154, 164 (C.D. Cal. 1979); *Bowman* v. *NFL*, 402 F.Supp. 754 (D.Minn. 1975); *Kapp.* v. *NFL*, 390 F.Supp. 73 (N.D.Cal. 1974), *appeal vacated*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979). *Cf. San Francisco Seals Ltd.* v. *National Hockey League*, 379 F.Supp. 966 (C.D. Cal. 1974); *Levin* v. *National Basketball Association*, 385 F.Supp. 149 (S.D.N.Y. 1974).

P. App. A 16a-17a, 670 F.2d at 1256-57. Few areas of the law are marked by such uniformity of decision. Only *affirmance* of the District Court's anomalous single economic entity ruling would have created any conflict.

Indeed, one recent lower court decision (in a case upholding a Section 1 attack by one of these same NFL petitioners here, the Oakland Raiders, against the others) expressly rejected the district court's single economic entity theory on legal grounds virtually identical to those relied upon by the Second Circuit below:

> In the first place, the argument, if valid, would prove too much. If the NFL must be treated as a single entity in this lawsuit simply because all its teams must cooperate to produce the League product, the NFL should be just as much a single entity—and hence just as incapable of violating section 1 of the Sherman Act—in cases challenging League restrictions on the acquisition of players. Yet such League rules have repeatedly been found to violate section 1.
>
> Secondly, organizations whose product is just as unitary as the NFL's and requires the same kind of cooperation from the organization's members, have been found to violate section 1 of the Sherman Act. . . .
>
> A third problem with the NFL's argument is that it seems to rest on a false premise—that the individual

> NFL clubs are not separate business entities whose products have an independent value.

Coliseum III, 519 F.Supp. at 583-84 (citations omitted).

The NFL petitioners now ask this Court to grant *certiorari*, reverse all of these precedents and adopt "more definitive guidelines" (Pet. 7) exempting the agreements of professional sports teams from Section 1 scrutiny on the theory that "the relevant economic entities are leagues, not teams" (Pet. 6). Specifically, the NFL petitioners assert that unless this Court exempts their agreements from "*ad hoc* judicial review as though they were agreements and conspiracies among economically independent persons," "confusions, conflicts and irrationalities" will result (Pet. 11).

We are at a loss to see where the confusion, much less irrationality, arises. It is certainly not in the courts. For in all the non-baseball cases cited and discussed by the NFL petitioners as examples of such confusion (Pet. 11-13), and in all the cases cited above by the Second Circuit, one uniform thread emerges: the agreements of professional sports leagues and their member teams unquestionably are subject to scrutiny under Section 1 in accordance with the rule of reason, which rule simply requires the courts to balance the procompetitive objectives of a restraint against its anticompetitive effects to determine whether, in light of all the surrounding circumstances, it is an unreasonable restraint of trade. *See, e.g., NFL Petitioners' Antitrust Liability Cases;* discussion *infra* at 17-19.

Application of the rule of reason to sports cases has resulted in no "havoc" (Pet. 7) of any kind. Where the courts have determined that the challenged conduct involved restraints enacted by sports leagues and their members without anticompetitive intent and effect, and that those restraints were reasonably required to effectuate the

operations of the league, the agreements have withstood scrutiny under the rule of reason. *See, e.g., Neeld* v. *NHL*, 594 F.2d 1297 (9th Cir. 1979); *Levin* v. *NBA*, 385 F.Supp. 149, 152-53 (S.D.N.Y. 1974); *San Francisco Seals, Ltd.* v. *NHL*, 379 F.Supp. 966, 971 (C.D. Cal. 1974); *Molinas* v. *NBA*, 190 F.Supp. 241 (S.D.N.Y. 1961). On the other hand, where, as here, the challenged restraint was adopted with an anticompetitive intent and effect, and with no proven procompetitive benefits, it has been stricken. P. App. A 13a, 26a-27a, 670 F.2d at 1255, 1261; *see also NFL Petitioners' Antitrust Liability Cases.*

The NASL respondents, of course, are just as much a sports league as the NFL petitioners, and certainly would not argue in support of a position which is incompatible with the legitimate interests of a professional sports league, as the NFL petitioners suggest (Pet. 16-17). Respondents are not confused in the least over the meaning of the long line of prior sports cases; and they are perfectly willing to have their agreements subjected to scrutiny under the rule of reason, since under that rule, legitimate restraints necessary for the operation of the league (such as scheduling, expansion, and other reasonable ownership determinations) should be (and have been) upheld. It is only anticompetitive restrictions, such as the cross-ownership ban, adopted with a specific and demonstrable anticompetitive purpose and effect, that run afoul of the rule of reason.

The patina of professional sports in general, and of football in particular, does not transport the NFL team owners to some special harbor, safe from the traditional antitrust scrutiny which applies to everyone else.[12]

12. The Department of Justice concurs. *See* Statement of Abbott B. Lipsky, Jr., Deputy Assistant Attorney General, Antitrust Division, to the United States House of Representatives, Committee on the Judiciary, Subcommittee on Monopolies and Commercial Law, dated July 14, 1981 (a copy of which is attached as Appendix B hereto):

> [T]he Department has, throughout the years, held consistently to the view that professional team sports are businesses and, as

(footnote continued on next page)

In an obvious effort to create the appearance of some "variance" with past decisions of this Court (Pet. 6), the NFL petitioners offer this Court the same erroneous view of the facts they presented to, and had rejected by, both courts below: to wit, they assert that the NASL respondents have sought by this lawsuit, and obtained from the Second Circuit, an order "*requir*[*ing*] the NFL [petitioners] to subsidize and strengthen teams in a directly competing league . . .", and *compelling* the NFL petitioners to "help a smaller competitor" (Pet. 6). This is transparently inaccurate.

No such compulsion was ever sought by the NASL respondents, nor was it in any way ordered by the Second Circuit. The elimination of the cross-ownership ban will not "force" any NFL owner to do anything. All that the NASL respondents have sought is to end a ban, self-imposed by the agreement of the individual NFL team owners, which ban would prevent Lamar Hunt, the Robbie family and other individual NFL team owners from making up their own respective minds as to the wisdom of owning an NASL team. If an NASL franchise is not deemed to be a desirable investment opportunity, an NFL team owner need not invest. All the Second Circuit has held is that it should be the free market, not a private anticompetitive agreement, that determines the supply of sports ownership capital and skill available for NASL franchises.

---

such, should be held as fully accountable under the antitrust laws as is any other industry. In our view, the flexible principles that are embodied in the antitrust laws should apply to sports as they do to every other regulated segment of our economy [App. B at 5a]. * * *

[A]ntitrust courts have sufficient flexibility in a rule of reason analysis to take into account any special considerations that may be found to exist in [professional sports] [App. B at 8a]. * * *

[T]he willingness of the courts to use a rule of reason analysis where it is called for in cases involving professional sports effectively refutes any claim that the antitrust laws should not be allowed to play their intended role in this particular segment of our economy [App. B at 8a].

Further, the NFL petitioners' request for special treatment under the antitrust laws rests on two factual premises that have been conclusively rejected in the courts below: that the NFL and its members operate as one enterprise, without any meaningful competition among the NFL teams (Pet. 9); and that the only meaningful competition which takes place between petitioners and respondents is on a league vs. league, rather than a team vs. team basis (Pet. 11, 13-15 n. 7, 17).

The NFL petitioners close their eyes to the unequivocal findings below that: (i) each NFL team is a "separately owned, discrete legal entity" (P. App. A 5a, 670 F.2d at 1252); and (ii) "competition exists between NFL members in various respects" (P. App. A 20a, 670 F.2d at 1258). Similarly, the NFL petitioners ignore the express findings below concerning the intense and substantial local competition that exists between individual NFL and NASL teams located in the same region. It is this economic competition between individual teams which forms the basis of all the so-called league vs. league competition alluded to by the NFL petitioners (P. App. A 10a-11a, 670 F.2d at 1254). A New York sports fan, for example, does not buy an NFL ticket or an NASL ticket; he buys a ticket to see the NFL's New York Giants or the NASL's New York Cosmos. The desire to suppress this team vs. team competition, with its resulting impact upon the separate, unshared expenses, profits and losses of the individual NFL team owners, was found below to be the primary anticompetitive motivation for those NFL team owners, like Leonard Tose and Max Winter, who were the leading proponents of the cross-ownership ban (P. App. A 10a-11a, 670 F.2d at 1254).

Moreover, it is undisputed that the NFL petitioners have not organized themselves as a single entity to own and operate all of their teams. Rather, having chosen to avail themselves of the benefits of doing business as discrete business entities, the petitioners come within the de-

cisions of this Court which make it plain that they must bear the antitrust responsibilities which go along with that choice. *See, e.g., Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-142 (1968) ("since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities").[13] Here, the individual NFL petitioners do not have any common ownership; thus, this Court's reasoning in *Perma Life* and *Timken* applies *a fortiori*.[14]

In sum, the Second Circuit was clearly within mainstream antitrust, simply restating the principles of numerous sports league cases, when it concluded that the independent NFL team owners had to play by the same antitrust rules as other joint venturing businessmen. Moreover, the NFL petitioners most obviously have survived and prospered despite the "havoc" and "confusion" of living under the antitrust laws. *Certiorari* is not necessary since the "definitive guidelines" the NFL petitioners allegedly seek already exist: sports team owners are subject to the antitrust laws; reasonable restraints needed to effectuate league play will be permitted; demonstrably anticompetitive restraints unnecessary to effectuate league

13. *See also, Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 598 (1951) (in which this Court rejected a claim that the "joint venture" status of a business association could be used to shield from Section 1 scrutiny anticompetitive agreements between the legally separate persons comprising the association).

14. Nor does the NFL petitioners' asserted "need" to engage in joint activity provide any basis for granting them Section 1 immunity in this case. In numerous decisions involving similar joint ventures which were "necessary" for the creation of a "joint" product, the courts have consistently applied Section 1 of the Sherman Act to restraints agreed to by the joint venturers. *See, e.g., Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1 (1979); *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); *Associated Press* v. *United States*, 326 U.S. 1 (1945).

play will be stricken;[15] and Congress' doors are open to the petitioners should they continue to seek an exemption from these "guidelines." The NFL petitioners simply don't want to understand that which all other sports team owners—and businessmen—have no trouble comprehending: namely, that absent congressional exemption, the antitrust laws apply to all commerce and businessmen. Denial of *certiorari* will help rid them of this "confusion."

II

THE SECOND CIRCUIT'S CONDEMNATION OF THE CROSS-OWNERSHIP BAN UNDER THE RULE OF REASON WAS CONSISTENT WITH, AND MANDATED BY, PRIOR DECISIONS OF THIS COURT.

The Courts below uniformly found that the NFL petitioners' cross-ownership ban has an express anticompetitive purpose and effect; thus, the Second Circuit's conclusion that the ban violates Section 1 of the Sherman Act represents a routine application of this Court's decisions delineating the appropriate inquiry under the rule of reason. Under the rule of reason, the decisive issue is "whether the challenged agreement is one that promotes competition or one that suppresses competition," an inquiry which entails an analysis of the purpose and effect of the restraint to determine whether, on balance, its supposedly procompetitive objectives (if any) outweigh its anticompetitive effects. *National Society of Professional Engineers* v.

15. Indeed, even the commentators relied upon by the NFL petitioners (Pet. 9-10 n.6) state that a league's ownership approval requirements should be reviewable under the antitrust laws where the owner is "disapproved for anticompetitive reasons, as where a league rejects a former promoter of a rival league solely for the purpose of punishing him for his prior efforts"—a hypothetical which bears remarkable similarity to the cross-ownership ban. *See* J. C. Weistart & C. H. Lowell, *The Law of Sports*, § 5.11, at 756-57 (1979).

United States, 435 U.S. 679, 691 (1978); *Continental TV, Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49-51 (1977).

If a group restraint is found to be motivated by a specific anticompetitive intent, it is invalid under the rule of reason.[16] Similarly, a contract, combination or conspiracy which restrains trade is invalid under Section 1 of the Sherman Act unless it has offsetting procompetitive effects. *See, e.g., National Society of Professional Engineers*, 435 U.S. at 688. Under these tests, the NFL petitioners' cross-ownership ban could not have survived antitrust analysis:

> As the district court found, the cross-ownership ban "has a conceded anticompetitive intent and, in its impact on the NASL, will probably have an anticompetitive effect." 505 F.Supp. at 689 [P. App. B 96a].
>
> • • •
>
> [T]he voluminous trial record discloses that the NFL's cross-ownership ban would foreclose NASL teams from continued enjoyment of and access to a significant segment of the market supply of sports capital and skill, thereby restraining at least some NASL teams from competing effectively against NFL teams for fan support and TV revenues. Any resulting restraint would benefit not merely the NFL as a league but those NFL teams that would be otherwise weakened individually and disproportionally (as compared with other NFL teams) by competing NASL teams.
>
> • • •
>
> [The cross-ownership ban's asserted] procompetitive effects are not substantial and are clearly outweighed

16. *See, e.g., McLain* v. *Real Estate Board*, 444 U.S. 232, 243 (1980); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 436 n. 13 (1978); *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 468-69 (1962); *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 614 (1953); *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 522 (1948).

> by its anticompetitive purpose and effect. Its net effect is substantially to restrain competition, not merely competitors. It therefore violates the rule of reason.

P. App. A 13a, 27a, 670 F.2d at 1255, 1259, 1261 (citations omitted).

The NFL petitioners criticize the Second Circuit's rule of reason analysis on the basis of: (i) the Court of Appeals' discussion of the market for sports ownership capital and skill, and (ii) its discussion of less restrictive alternatives available to the NFL petitioners. Neither of these arguments provides any basis for granting *certiorari* herein.

A. The Court of Appeals Properly Dealt With the Market Issue.

Having to concede the cross-ownership ban's anticompetitive intent and effect, as well as its lack of any procompetitive purpose, the NFL team owners invent in their petition for *certiorari* a supposed need to define with mathematical certainty the precise boundaries of the market in which such a restraint occurs. The NFL petitioners thus challenge the Court of Appeals' discussion of the market for sports ownership capital and skill on the ground that the discussion allegedly assessed "seller characteristics," rather than "product characteristics" (Pet. 18-21). Specifically, they accuse the Second Circuit of ignoring this Court's teachings in *Brown Shoe Company* v. *United States*, 370 U.S. 294 (1962) (a Section 7 Clayton Act case), and of failing to determine "where the NASL can practicably turn for supplies of investment capital" (Pet. 20-21). The NFL petitioners are wrong both generically and specifically.

The Court of Appeals, in discussing the market in which the cross-ownership ban occurred, in fact applied the practical indicia set forth by this Court in the *Brown Shoe*

decision (P. App. A 24a-26a, 670 F.2d at 1260-61). Precisely because it did review and rely upon the voluminous record evidence which addressed the question of "where the NASL can practicably turn for supplies of investment capital" (rather than on petitioners' *ipse dixit* assertions), the Court of Appeals concluded that the potential ownership sources available to the NASL respondents were significantly limited in scope and decidedly distinct from the general capital markets available to ordinary industrial corporations seeking passive investment dollars. The Court of Appeals, relying on the factual findings of the District Court, thus stated:

> [A]n owner may in practice sell his franchise only to a relatively narrow group of eligible purchasers, not to any financier. The potential investor must measure up to a profile having certain characteristics. Moreover, on the supply side of the sports capital market the number of investors willing to purchase an interest in a franchise is sharply limited by the high risk, the need for active involvement in management, the significant exposure to publicity that may turn out to be negative, and the dependence on the drawing power and financial success of the other members of the league. The record thus reveals a market which, while not limited to existing or potential major sports team owners, is relatively limited in scope and is only a small fraction of the total capital funds market.

P. App. A 24a-25a, 670 F.2d at 1260; *see also, supra* n.6 and accompanying text. These factors clearly limit the potential sources of sports ownership capital and skill available to the NASL respondents,[17] and are completely consistent

17. Of course, if the market for such ownership resources were not so very limited, the NASL respondents would hardly have spent so much time and money litigating this case to keep the resources of Mr. Hunt and the Robbies and to have the chance to interest other NFL team owners. As Steve Rosenbloom, the son of the former

(footnote continued on next page)

with the *Brown Shoe* criteria (assuming, *arguendo*, that those Section 7 Clayton Act criteria are even relevant to a Section 1 Sherman Act conspiracy concededly involving an anticompetitive purpose and effect, and no procompetitive aspects).

Rather than imposing antitrust liability "irrespective of market consequences," as the NFL petitioners assert (Pet. 23), the Court of Appeals expressly determined that the portion of the sports ownership capital and skill market foreclosed by the cross-ownership ban was "significant";[18] and agreed with the District Court's unavoidable finding that the ban had a concededly anticompetitive purpose and effect (P. App. A 13a, 25a-26a, 670 F.2d at 1255, 1260-61). Indeed, as the Second Circuit stated:

> [T]he existence of such a submarket and the importance of the function of existing team owners as sources of capital in that market are implicitly recognized by the defendants' proven intent in adopting the cross-ownership ban. If they believed, as NFL now argues, that all sources of capital were fungible substitutes for

---

owner of the NFL's Baltimore Colts, testified concerning his family's experience in attempting to sell the Colts:

> As I say from experience, it is a small market, because it was no secret we might have sold the thing and that we were talking to people. A few people came around, and those that came around never came up with any concrete proposal. I would take that experience and say, theoretically or practically, or realistically, there didn't seem to be a large market for it.

P. App. A 25a n.7, 670 F.2d at 1260 n.7.

18. As the Court of Appeals recognized:

> The attractiveness of existing owners of major sports teams as sources of potential capital is further evidenced by the large number of members of major sports leagues who control or own substantial interests in members of other leagues. The record reveals some 110 instances of cross-ownership and some 238 individuals or corporations having a 10% or greater interest in other teams. Over the last 13 years there have been 16 cross-ownerships between NFL and NASL teams.

P. App. A 9a, 670 F.2d at 1253.

> investment in NASL sports teams and that the ban would not significantly foreclose the supply of sports capital, they would hardly have gone to the trouble of adopting it.

P. App. A 25a, 670 F.2d at 1260-61.

With a demonstrable anticompetitive purpose and effect evidenced by the record, there was no reason for the Second Circuit to have to specify, as the petitioners contend (Pet. 21-23), the exact numerical percentage of the obvious market foreclosed by the cross-ownership ban (P. App. A 25a-26a, 670 F.2d at 1260-61). The only purpose for measuring market foreclosure in the first place is to determine whether or not there is an anticompetitive effect,[19] and there was no dispute by either court below that the cross-ownership ban had such an effect in this case (P. App. A 13a, 670 F.2d at 1255; P. App. B 96a, 505 F.Supp. at 689).[20]

19. The vertical restraint cases cited by the NFL petitioners for the proposition that market foreclosure should be expressed in numerical terms (Pet. 21 n.13) are not only inapposite to the horizontal agreement among members of a joint venture at issue in this case (P. App. A 20a-22a, 670 F.2d at 1258-59), but are entirely consistent with the principle that precise quantitative assessments of market foreclosure are merely one means for determining whether a particular restraint is likely to cause the type of anticompetitive effects condemned by the antitrust laws and found by both lower courts below.

20. Boycotts of this kind have repeatedly been struck down whenever the resource being withheld placed the victims of the boycott at a competitive disadvantage. *See, e.g., Associated Press*, 326 U.S. at 17-19 (*per se* rule applied to a group boycott depriving competitors of certain news gathering facilities even though other sources of news gathering were found to be available; a proposed "indispensability" test was expressly rejected by this Court); *United States* v. *Insurance Board of Cleveland*, 188 F.Supp. 949, 959 (N.D. Ohio 1960) (holding unlawful a boycott by insurance brokers of mutual companies that merely denied them access to some of the most profitable and best insurance agents available); *Far Eastern Coconut Co.* v. *Sun Ripe Coconut Corp.*, 1979-2 Trade Cas. ¶62,878 (E.D. N.Y. 1979) (holding that a boycott by two coconut dealers of a jobber could violate Section 1 of the Sherman Act even though the dealers supplied less than 5% of the jobber's purchases).

B. The Court of Appeals Correctly Considered the Availability of Less Restrictive Alternatives in Evaluating the Cross-Ownership Ban Under the Rule of Reason.

The NFL petitioners also fault the Court of Appeals for purportedly requiring them to come forward with proof that their supposedly legitimate objectives could not be achieved by less restrictive means (Pet. 23-25). Again, the NFL petitioners simply ignore this Court's prior decisions.

The less restrictive alternative analysis applied by the Court of Appeals was entirely consistent with this Court's decision in *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963), and other governing case law.[21] The decision in *Silver* reaffirmed the rule that where, as here, an established *per se* rule—such as that ordinarily applied to group boycotts (*see, e.g., Associated Press*, 326 U.S. 1 (1945))—is not applied because of an asserted need for self-regulation (P. App. A 19a-22a, 670 F.2d at 1258-59), the restraint at issue can only be justified when it is limited "to the extent necessary." 377 U.S. at 400, 402. This rule has repeatedly been applied to boycotts and similar restraints agreed to by the member teams of professional sports leagues, including the NFL.[22]

21. *See, e.g., Hennessey* v. *NCAA*, 564 F.2d 1136, 1153-54 (5th Cir. 1977); *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 506 F.2d 934, 942-43 (5th Cir. 1975); *Worthen Bank & Trust Co.* v. *National BankAmericard, Inc.*, 485 F.2d 119, 130 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974); *Siegel* v. *Chicken Delight Inc.*, 448 F.2d 43, 51 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); *Sandura Co.* v. *FTC*, 339 F.2d 847, 856 (6th Cir. 1964); *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

22. *See, e.g., Smith* v. *Pro-Football, Inc.*, 593 F.2d 1173, 1187-89 (D.C. Cir. 1978); *Mackey* v. *NFL*, 543 F.2d 606, 620 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Linseman* v. *WHA*, 439 F.Supp. 1315, 1322-23 (D. Conn. 1977); *Denver Rockets* v. *All-*

(footnote continued on next page)

The rule of reason analysis applied by the Second Circuit to strike down the cross-ownership ban was thus a routine application of the most fundamental antitrust principles and is completely consistent with the prior decisions of this Court. There is no need to grant *certiorari* to review such well-established principles.

III

THE NFL PETITIONERS' REQUEST FOR IMMUNITY FROM SECTION 1 OF THE SHERMAN ACT SHOULD BE DIRECTED TO CONGRESS, NOT TO THIS COURT.

The NFL petitioners seek nothing less than to have this Court legislate an exemption from Section 1 of the Sherman Act for the owners of professional sports teams. Somehow it has taken root in their collective psyche that, as owners of helmeted and padded gladiators, ordinary business rules should not apply to them—they should be above it all. Their petition is of a piece with this attitude. They assert

---

Pro Management, Inc., 325 F.Supp. 1049, 1065 (C.D. Cal.), *stay vacated sub nom., Haywood* v. *NBA*, 401 U.S. 1204 (1971).

Moreover, the Second Circuit's ruling that "the existence of less restrictive alternatives is obviously of vital concern in evaluating putatively anticompetitive conduct" (P. App. A 22a, 670 F.2d at 1259) is, contrary to petitioners' assertions (Pet. 23-25), perfectly consistent with the prior case law, including the Third Circuit's decision in *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230 (3rd Cir. 1975). In *American Motor Inns*, the court required the restraint before it to be "fairly necessary" or "reasonably necessary" to protect the legitimate interests of the defendants (521 F.2d 1248-49). However, it also acknowledged that a more stringent, less restrictive alternative test has been applied where an exception to a *per se* rule was at issue (521 F.2d at 1249)—precisely the situation herein. Indeed, the Second Circuit below expressly relied upon its earlier decision in *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 303 (1979), *cert. denied*, 444 U.S. 1093 (1980), as authority for its less restrictive alternative analysis (P. App. A 22a, 670 F.2d at 1259). The decision in *Berkey*, in turn, held that such analysis was fully supported by the decision of the Third Circuit in *American Motor Inns.* 603 F.2d at 303.

that the antitrust laws are "entirely foreign to the sports league business relationship" (Pet. 7); that application of the antitrust laws to them creates "judicial havoc" (Pet. 7); that the federal courts are "unable to cope" with the mystique of a professional football league (Pet. 7); that lower courts have "groped in vain" (Pet. 8) for guidance and "invoke inappropriate antitrust principles designed for horizontal business competitors . . ." (Pet. 9). They cry out for "direction from this Court" (Pet. 8). But the "direction" they seek is not truly guidelines, for they abjure "*ad hoc* judicial review" (Pet. 11) conducted in the "vagrant manner" (Pet. 17) required for weighing pro- and anticompetitive effects. Rather, the "direction" the NFL petitioners seek is to an exit from Section 1 of the Sherman Act altogether because, in their view, "the relevant economic entities are leagues, not teams" and a Section 1 conspiracy requires "separate economic entities" (Pet. 6).

This Court has repeatedly rejected all attempts by antitrust defendants, such as the NFL petitioners, to argue that the special problems of their industries, or supposed "public policy" considerations unrelated to competition, provide a basis for the judiciary creating its own special interest exceptions to the Congressionally-mandated policy in favor of unrestrained competition. *See, e.g., Arizona* v. *Maricopa County Medical Society*, —— U.S. ——, 50 U.S.L.W. 4687, 4692 (1982); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978); *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610-12 (1972); *Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U.S. 457, 465 (1941). As this Court explained in *National Society of Professional Engineers*:

> [T]he purpose of the [rule of reason] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the in-

> terest of the members of an industry. Subject to the exceptions defined by statute, that policy decision has been made by the Congress.[23]

Similarly, in *Topco*, this Court rejected a claim by members of an association of small supermarkets that they should be able to allocate territories pursuant to a cooperative buying arrangement because such a restraint allegedly was in the public interest in that it enabled the association members to compete more effectively against larger national and regional chains:

> The District Court determined that by limiting the freedom of its individual members to compete with each other, Topco was doing a greater good by fostering competition between members and other large supermarket chains. But, the fallacy is that Topco has no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy. On the contrary, the Sherman Act gives to each Topco member and to each prospective member the right to ascertain for itself whether or not competition with other supermarket chains is more desirable than competition in the sale of Topco-brand products.
>
> • • •
>
> There have been tremendous departures from the notion of a free-enterprise system as it was originally conceived in this country. These departures have been the product of congressional action and the will of the people. If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision that

23. 435 U.S. at 692. *See also, Fashion Originators' Guild*, 312 U.S. at 465 (group boycott of retailers who sold "pirated" dress designs could not be justified on the ground that competition from pirated designs violated state law and was not in the public interest, since it was for Congress, not private parties, to determine whether a particular type of competition was desirable).

> must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decision-making.

405 U.S. at 610-12.

More recently, this Court has expressly noted the inappropriateness of the judiciary resolving significant competition policy issues, such as those presented by the NFL petitioners' Section 1 immunity request:

> The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to political branches of the Government, to the Congress and the Executive, and not to the courts.

Texas Industries, Inc. v. *Radcliff Materials, Inc.*, 451 U.S. 630, 101 S.Ct. 2061, 2070 (1981), *quoting, Diamond* v. *Chakrabarty*, 447 U.S. 303, 317 (1980).

Interestingly enough, having lost in the Court of Appeals below, the NFL petitioners did in fact finally bring their Section 1 immunity request to the proper forum, the Congress of the United States. On February 5, 1982, a mere six days after the Second Circuit found them guilty of deliberately suppressing the competition presented by NASL teams, the NFL petitioners submitted to the House Judiciary Committee proposed legislation which would grant their Section 1 immunity request and absolve them retroactively from all antitrust liability in this and other

pending cases. Congress has been totally unreceptive to date.[24]

If Congress has not seen fit to overrule more than a quarter of a century of decisions, including this Court's seminal decision in *Radovich*, holding professional sports team owners, including these NFL petitioners, subject to the rule of reason under Section 1 of the Sherman Act, this Court should not do so now.[25] The policy which Congress has declared in the Sherman Act is that unrestrained competition is to be the rule of trade. When Congress has wanted to grant a specific industry an exemption from this mandate, it has expressly done so—as it did twice in the past when the NFL petitioners sought limited antitrust exemptions for their joint television negotiations and the NFL-AFL merger (*see* 15 U.S.C. §§ 1291-1295). This Court should not grant *certiorari* and now take on Congress' exclusive policy-making prerogative by entertaining the NFL petitioners' Section 1 immunity request.

---

24. *See NFL Fails to Get Antitrust Bill Introduced*, The Washington Post, Apr. 2, 1982, at D1, col. 1; *NFL Presses for Antitrust Exemption*, N.Y. Times, Apr. 4, 1982, Sec. 5 at 8, col. 3 (attached hereto as Appendices C and D).

25. *Cf. Flood* v. *Kuhn*, 407 U.S. 258 (1972). In *Flood*, this Court determined that since years earlier it had held, in an admittedly anomalous ruling, that baseball teams are exempt from the antitrust laws, any change in that status must be made by Congress. The same principle applies *a fortiori* in this case, since the courts have consistently held that the NFL petitioners and other sports team owners are subject to Section 1 of the Sherman Act, and Congress has not granted them an exemption for the conduct here in issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

IRA M. MILLSTEIN
Attorney for Respondents
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Of Counsel:

JAMES W. QUINN
IRWIN H. WARREN
JEFFREY L. KESSLER
KENNETH L. STEINTHAL
JEFFREY S. KLEIN
WEIL, GOTSHAL & MANGES

July 15, 1982

APPENDIX A

Excerpt from Respondents' Court of Appeals Reply Brief (Pages 14-15)

existence of a limited market for sports ownership capital and skill (NASL Pl. Br. 13-17, 68-76); (ii) the District Court's failure to define this market was based on fundamental errors of law and fact (NASL Pl. Br. 68-76); and (iii) even if there were no relevant market for sports ownership capital and skill, the cross-ownership ban would still be an unlawful restraint of trade because of its conceded anticompetitive purpose and effect in the major professional team sports market (Op. at A2011; NASL Pl. Br. 68).[18] The NFL defendants have offered only three words in response: "capital is fungible" (NFL Def. Br. 30).

No one, of course, would dispute the fact that capital is fungible, and if the plaintiffs were industrial corporations selling bonds on the New York Stock Exchange, they would have an enormous capital market to approach. The NASL plaintiffs, however, are not industrial corporations and they are not just looking for passive investment dollars. They are sports teams looking for qualified owners, and the market to buy and sell team sport franchises—as NFL Commissioner Rozelle testified (Tr. 2866 Vol. XIV; Tr. 3215, 3217 Vol. XV)—is very different from, and far more limited than, the general capital markets described by the defendants.[19]

18. Indeed, the District Court found that the forced departure of Lamar Hunt and the Robbies alone would have a seriously adverse effect on the competitive status of the NASL plaintiffs (Op. at A1960). The NFL defendants' suggestion that Mr. Hunt would be just as likely to sell his NASL team as his NFL team in order to comply with the cross-ownership ban borders on the absurd; they have simply taken an isolated quote about Mr. Hunt's willingness to consider the sale of any asset at the right price (NFL Def. Br. 7, n.7, citing Hunt, Tr. 1196, 1486-90 Vol. X), while neglecting the fact that on the very same page, Mr. Hunt stated quite plainly that he has no desire to sell his NFL franchise (Hunt, Tr. 1490 Vol. X).

19. As witnesses for both the NASL plaintiffs and NFL defendants consistently agreed, a major professional team sports league cannot long survive without strong individual team ownership (NASL Pl. Br. 11-13). This is particularly true for a relatively immature league like the NASL (NASL Pl. Br. 9-11). Indeed, just since the filing of this lawsuit in September of 1978, 17 of the 21 NASL plaintiff teams have either relocated, experienced a major ownership transfer or gone out of business entirely.

Appendix A

The NASL plaintiffs have never contended that the potential supply of sports owners is limited to Lamar Hunt and the Robbie family, the NFL defendants, or even all major professional sports team owners (although the latter do constitute the entire supply of owners currently in the market). However, all of the record evidence—including the NFL defendants' own experience (NASL Pl. Br. 22, 73-74)—clearly demonstrates that the actual and potential supply of qualified franchise owners that does exist is extremely limited (NASL Pl. Br. 9-23, 68-76),[20] and that any cross-ownership ban by the NFL defendants would have a significantly adverse effect on the NASL plaintiffs (Op. at A1960). The NFL defendants' brief simply ignores these record facts.

III.

THE NFL DEFENDANTS FAIL TO ADDRESS THE CONTROLLING AUTHORITIES AND RECORD EVIDENCE WHICH DEMONSTRATES THAT THE CROSS-OWNERSHIP BAN IS, AT THE VERY LEAST, AN UNREASONABLE RESTRAINT OF TRADE.

Applying Section 1 of the Sherman Act to the cross-ownership ban, it quickly becomes evident why the NFL defendants have fought so hard to preserve their single economic entity defense: the ban plainly violates Section 1. The group boycott decisions (which the NFL defendants never discuss in their brief) demonstrate that the ban is a classic *per se* violation (NASL Pl. Br. 76-82). On this ground alone, a violation should be found.

20. Notwithstanding defendants' repeated efforts to understate the importance of cross-owners, it is undisputed that at the time this action was commenced, 12 NASL franchises were owned in whole or part by cross-owners and fully 18 of the NFL's 28 teams had some prior or concurrent ownership interest in another professional team sport. Nor is it disputed that the owners of 10 of the 21 NHL franchises, 13 of the 23 NBA franchises, and 7 of the 26 MLB franchises simultaneously own interests in other professional sports teams today (NASL Pl. Br. 16-17).

APPENDIX B

[LETTERHEAD OF]

U.S. DEPARTMENT OF JUSTICE

Washington, D.C. 20530

STATEMENT

OF

ABBOTT B. LIPSKY, JR.
DEPUTY ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE

SUBCOMMITTEE ON
MONOPOLIES AND COMMERCIAL LAW

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

PROFESSIONAL SPORTS AND THE
ANTITRUST LAWS

JULY 14, 1981

Appendix B

Mr. Chairman and Members of the Subcommittee:

I am pleased to testify today on the antitrust aspects of professional sports. Professional sports are an important and highly visible part of our society. Interests in sports vary tremendously—they include those of the owners, the players, the fans, and communities in general. Sports have educational, moral, and, of course, economic aspects. With respect to the latter, antitrust has a most important role to play, and I think the Subcommittee's interest in the area is both warranted and particularly timely.

The purpose of the Subcommittee's inquiry, as I understand it, is to examine a wide range of issues in professional sports—and in particular, professional team sports—that appear to give rise to antitrust concerns. The Department has had but limited direct experience in this area, and while I cannot represent having substantial expertise in this area, we are happy to contribute what we can to the Subcommittee's review.

We have brought very few cases in the sports field. They have involved boxing,[1] wrestling,[2] trotting racing,[3] and professional football;[4] all of these cases were brought before 1960. In addition, and particularly in recent years, the Department has closely monitored private litigation and proposed league mergers involving professional sports

Fairly intense antitrust litigation in the private sector, by parties whose interests are most directly affected, explains the Department's limited history of direct enforcement activity in the sports area. We must make the best

1. *United States* v. *International Boxing Club*, 348 U.S. 236 (1955).

2. *United States* v. *National Wrestling Alliance*, 1956 Trade Cases, ¶ 68,507 (S.D. Iowa 1956) (consent decree).

3. *United States* v. *United States Trotting Association*, 1960 Trade Cases, ¶ 69,761 (E.D. Ohio 1960).

4. *United States* v. *National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953).

use of limited enforcement resources that we can, and duplication of private litigation is generally not a wise investment.

However, the Department has, throughout the years, held consistently to the view that professional team sports are businesses and, as such, should be held as fully accountable under the antitrust laws as is any other industry. In our view, the flexible principles that are embodied in the antitrust laws should apply to sports as they do to every other unregulated sector of our economy. We are by no means alone in this view; with the exception of professional baseball, the courts have consistently held that the antitrust laws fully apply to professional sports. *See, e.g., Flood* v. *Kuhn*, 407 U.S. 258, 282-83 (1971); *Radovich* v. *National Football League*, 352 U.S. 445 (1957); *San Francisco Seals Ltd.* v. *National Hockey League*, 379 F. Supp. 966, 968 (C.D. Cal. 1974).

The important question, of course, is just *how* the antitrust laws should apply to professional sports. Over the years, representatives of professional team sports have argued that sports have unique characteristics which set them apart from other businesses and require sports to operate under commercial rules that differ from those applied to other businesses. The response of the Department to this argument has been consistent over the years: the antitrust laws are sufficiently flexible to accomodate whatever unusual or unique business characteristics might exist in the professional sports industry.

We recognize that sports do, in fact, have some unique characteristics. A team may be likened to a business firm in that it is an economic entity, presumably in business to make a profit. Yet unlike the typical firm, a single team acting alone cannot offer the basic product to the public—it must cooperate with other teams to present an athletic contest that people will pay to observe.

Appendix B

Thus, sports require some consultation and cooperation among the teams in a given league in order for each to exist. For example, mutual cooperation and agreement are required with respect to the rules of play and the scheduling of games during a long season. However, an admitted need for some cooperation does not necessarily justify any and all agreements among the teams in a league, and several types of league rules remain controversial. For example, league claims that rules regarding player employment and the sale or transfer of player services among teams are necessary to protect weaker teams and to preserve competitive balance or strength throughout a given league have, not surprisingly, been challenged by those whose economic interests are primarily affected by such rules—the players. In addition, league representatives have defended rules regulating the admission of new teams and the relocation of teams against the argument that such rules unreasonably limit competition between teams and reduce fan alternatives.

Major questions exist as to whether, and to what extent, protecting the financial stability of teams and competitive balance within a league requires special treatment under the antitrust laws. Judicial response has indicated no strong sympathy to requests for special treatment; rather, the courts have tried to apply straightforward antitrust rules in a manner that accommodates the particular characteristics of professional team sports while promoting the important competitive objectives of the antitrust laws.

Perhaps the most basic of these antitrust rules is the "rule of reason", under which the alleged anticompetitive features of a practice or agreement are measured and weighed against procompetitive justifications. If, after such analysis, the agreement can be said to be reasonable under the circumstances, and no more restrictive than necessary, then it will not be held to be a violation of the antitrust laws.

Appendix B

This standard has been applied in recent years in private litigation involving player restraints. Cases have challenged the National Football League's rules relating to the player draft, tampering, the player reserve list, the Standard Player Contract and the so-called "Rozelle Rule", which formerly governed the compensation due a team that had lost a "free agent" to another team. In these cases, the courts have identified the purchase and sale of players' services as an area of competition worthy of antitrust protection and determined that various player rules, either alone or in combination with each other, were unreasonable restraints of trade as they existed and were applied at the time they were challenged. *See Smith* v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Kapp* v. *National Football League*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907; *Mackey* v. *National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

The appellate courts gave careful consideration to the asserted justifications for the challenged rules. In evaluating the Rozelle Rule, for example, the *Mackey* court stated: "We do recognize, as did the district court, that the NFL has a strong and unique interest in maintaining competitive balance among its teams. The key issue is thus whether the Rozelle Rule is essential to the maintenance of competitive balance, and is no more restrictive than necessary."[5] The court went on to analyze in some detail the nature and operation of the Rozelle Rule before holding that the Rule, as then enforced, unreasonably restrained trade in violation of the Sherman Act. But the court noted that "our disposition of the antitrust issue does not mean that every restraint on competition for players' services would necessarily violate the antitrust laws."[6]

5. *Mackey* v. *National Football League*, 543 F.2d 606, 621 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

6. 543 F.2d at 623.

Appendix B

Without attempting to judge the correctness of the outcome of these player restraint cases, I do endorse the method used by the courts in approaching their task. And I would point out that the willingness of the courts to use a rule of reason analysis where it is called for in cases involving professional sports effectively refutes any claim that the antitrust laws should not be allowed to play their intended role in this particular segment of our economy.

With this background, I would like to turn to baseball's exemption from the antitrust laws. Baseball received its special status as a result of the Supreme Court's decision in *Federal Baseball Club* v. *National League*,[7] that baseball was not "trade or commerce" within the meaning of the Sherman Act, nor was it interstate in nature. The Court has since rejected both of the rationales of its *Federal Baseball* decision. In *Flood* v. *Kuhn*,[8] the Court's most recent statement on the subject, the Court described the *Federal Baseball* decision as "an aberration." Nevertheless, it reaffirmed the *Federal Baseball* decision, but did so solely on the principle of *stare decisis* and stated that any change in the status of baseball under the antitrust laws would have to be made by Congress.

It has been the position of the Antitrust Division for some time that baseball's exemption is an anachronism and should be eliminated. I reaffirm that position today. I know of no economic data or other persuasive justification for continuing to treat baseball differently from the other professional team sports, all of which are now clearly subject to the antitrust laws. As I stated earlier, antitrust courts have sufficient flexibility in a rule of reason analysis to take into account any special considerations that may be found to exist in baseball.

I would be pleased to try to answer any questions that the Subcommittee has.

---

7. *Federal Baseball Club* v. *National League*, 259 U.S. 200 (1922).

8. *Flood* v. *Kuhn*, 407 U.S. 258 (1972).

APPENDIX C

The Washington Post, April 2, 1982, Page D1

NFL FAILS TO GET ANTITRUST BILL INTRODUCED

By Jane Leavy
Washington Post Staff Writer

The Senate recessed yesterday without introducing an antitrust exemption bill for professional sports, despite intense lobbying by the National Football League. A lawyer for the league had predicted that the bill would be introduced by the end of this week.

One of the immediate effects of the proposed legislation would be to extricate the NFL from the Oakland Raiders' lawsuit now being retried in Los Angeles.

A spokesman for Senate Majority Leader Howard Baker (R-Tenn.) said that although Baker favors an antitrust exemption, he would not support a bill that included a retroactivity clause. "He is not supportive of something that would impact on the Al Davis lawsuit," the spokesman said. "If that's what is in the draft, he would have some problems with it."

The spokesman said Baker had not seen any drafts of the proposed legislation and had no intention of introducing it when the Senate comes back in session April 13.

Sources said the NFL failed to get the bill introduced for several reasons: intense lobbying by the NFL Players Association and players unions in other sports; adverse publicity; and a crowded Senate calendar that included hearings on another controversial antitrust bill—which did not directly involve sports, but did involve the issue of retroactivity.

Ed Garvey, the executive director of the NFLPA, said, "I think it became such a hot potato that they had trouble finding a sponsor."

Appendix C

Sen. Alan Simpson (R-Wyo.) said he is "rather supportive of the legislation" and thinks there is "a special need to take a special look at the situation," but does not intend to sponsor the legislation.

A spokesman for Sen. Dennis DeConcini (D-Ariz.), who had been regarded as a potential sponsor, said he would not introduce legislation this week. A spokesman for Sen. Howell Helflin (D-Ala.) said he had no plans to introduce the legislation, although he might cosponsor it.

Garvey said senators opposing the legislation included Sen. Lowell Weicker (R-Conn.), Sen. Bill Bradley (D-N.J.) and Sen. Howard Metzenbaum (D-Ohio).

The NFLPA believed that proponents of the legislation would attempt to rush the bill through Congress, perhaps as a rider, without hearings.

Weicker, Bradley and Metzenbaum wrote letters to Baker and Sen. Robert Byrd (D-W. Va.), the minority leader, saying they would not give their consent to allow the bill to go directly to the floor, which meant that they would have to be notified if it were attached as a rider.

Paul Tagliabue, a lawyer for the league, said, "Any suggestion that we were trying to get legislation through the Senate without hearings is totally false . . . The expectation of the league always has been that there would be hearings with a full review of the merits."

The issue first became public last December, when NFL Commissioner Pete Rozelle testified before the subcommittee on monopolies and commercial law of the House Judiciary Committee that the league needed an antitrust exemption. NFL teams, he said, "are partners acting together in a common enterprise."

Appendix C

The league also argues that without an exemption, expansion is difficult, because under antitrust laws, the league can be sued by cities and persons not receiving franchises.

The league currently is involved in two antitrust lawsuits—the Davis suit and the one brought by the former owners of the World Football League franchise in Memphis, which has not yet gone to trial. He said these suits involve $150 million in potential liabilities.

In January, in an interview in the Memphis Commercial Appeal, Baker said he believed Memphis had "the best chance of any city in the country" to get an NFL franchise. He also said he supported legislation for an antitrust exemption, but that the two issues were separate.

The interview, Garvey said, was the union's first indication of the strength of support for the bill in the Senate.

On March 25, Rozelle admitted that the NFL was using the lure of expansion to win congressional support for the legislation. "If that's dangling," he said, "then it's dangling."

Joseph Alioto, Davis' attorney, responded by asking the Senate Ethics Committee to investigate. "If they don't act and put those people under oath, we'll file a civil suit alleging that they were trading a Memphis franchise for Baker's vote and we'll put them under oath," Alioto said.

In a letter dated March 25 to Sen. Malcolm Wallop (R-Wyo.), chairman of the Select Committee on Ethics, Baker reiterated that there was no connection between his support for both an NFL franchise in Memphis and antitrust leglislation.

Union representatives believe the antitrust legislation, as written in draft form, would give the league an antitrust exemption so broad that the NFL would, for example, have the right to negotiate pay television contracts as a single entity without getting a special exemption. The NFL had

to get a special exemption to negotiate with the television networks as a single entity in 1961.

They also say the bill has the potential to make it impossible for players to sue under antitrust laws over issues such as the draft, reserve rules and option clauses. Most of the players' gains on these issues have come through the courts as a result of suits brought under antitrust laws.

Tagliabue said the league was not asking for any expansion of the authority it was granted in 1961. "Under this bill, the players would have any and all antitrust rights they have now," he said.

Tom Jorde, a professor of antitrust law at the University of California at Berkeley, said, "Sports franchises are different from traditional manufacturing concerns in that they require a degree of cooperativeness to produce the high quality product, namely sports entertainment."

But he argues that this special status is "not sufficient justification for a complete exemption from the antitrust laws," and says these laws can be applied to the sports industry in a sensitive manner "by employing rule-of-reason standards that the courts have already developed."

Jorde says that there is an inequity regarding exemptions in professional sports, because baseball received a complete antitrust exemption from the Supreme Court in 1922—an exemption that other sports do not have. But he said the way to remedy that inequity is to have Congress repeal the exemption for baseball.

"The problem with an exemption is that it provides a monopoly to the league—and therefore monopoly profits to be divided between owners and players—and deprives consumers of any protection under the antitrust laws," he said.

APPENDIX D

New York Times, April 4, 1982, Section 5, Page 8

N.F.L. PRESSES FOR ANTITRUST EXEMPTION

WASHINGTON, April 3—The National Football League is on Capitol Hill, dealing with Congress in hopes of achieving what would be as important for the league as any Super Bowl. The N.F.L.'s aim: exemption of the league from Federal antitrust laws.

Within the next few weeks, N.F.L. owners say, a bill will be introduced in Congress designed to protect the league from almost all antitrust prosecution.

The legislation could dash the hopes of Al Davis, owner of the Oakland Raiders, who is suing the N.F.L., asserting that it has violated the 1890 Sherman Act, the nation's primary antitrust law. He has charged the N.F.L. with conspiring to stop him from moving the Raiders to Los Angeles. The league says there is no conspiracy, only 28 separate teams voting on the issue.

Players say that a bill exempting the N.F.L. from antitrust laws would lead to abuse of fans, stadium owners and the players themselves. "We're going to do everything we can to fight it," says Doug Allen, a spokesman for the National Football League Players Association.

Commissioner Pete Rozelle has called the antitrust exemption one of the league's top priorities. The league has mounted a lobbying effort, utilizing Washington lawyers, to get the bill through Congress this year.

Although drafts of the measure have been circulating for weeks, no Congressman has yet stepped forward to sponsor the bill. Its chances for passage if introduced are unclear. Congressional sources who asked not to be identified said they know of no firm support for the bill among the leadership of either the House or Senate.

Appendix D

Antitrust issues, the N.F.L. says, have overwhelmed the league and made the exemption necessary. The proposed bill might include similar antitrust protections for all professional team sports. So far, only baseball is exempt, based on a 1922 Supreme Court decision.

"We're just trying to clarify our status under the antitrust laws," says Thomas C. Williams, an N.F.L. attorney. "A professional sports league is different from other businesses. When we get together to decide something, we don't think we should be charged with conspiracy."

John C. Weistart, a law professor at Duke University, agreed with the league during testimony before a House antitrust subcommittee last fall. If professional sports leagues are to survive, Mr. Weistart said Friday, they must act in a manner the law might sometimes consider anticompetitive.

"The courts haven't shown that they understand the uniqueness of a sports league," said Mr. Weistart. He said he supported "narrowly drawn" antitrust exemptions for the N.F.L., as long as they did not affect labor issues.

Whether or not labor protections are written into the bill, Allen said the N.F.L. legislation would leave the league, unburdened by antitrust fears, free to conspire against players and even team owners.

"The potential for abuse is unlimited," he said. "Besides, why should a financially successful industry like the N.F.L. be granted privileges that don't exist for any other businesses?"

Allen said the league had done little to build public sympathy for itself when it announced a new network television contract last month that will bring in more than $2 billion over five years for the owners of the 28 N.F.L. teams, with each team getting an equal share of the revenue.

Appendix D

Destruction of Union Seen

One of the supporters of the players association is Gerald W. Scully, professor of economics at Southern Methodist University, who said that if the proposed antitrust exemptions were approved by Congress, "the N.F.L. would become a legal cartel." Mr. Scully also testified on the issue in Congress last year.

"It would effectively destroy the players union by giving the league almost complete authority to act collusively," he said.

Even though there appears to be no vocal support in Congress for the antitrust exemptions, N.F.L. representatives say they are hopeful of the bill's passage. "It'll happen," said Mr. Williams.

Players are not so sure, and they plan to have more than 50 players roaming the halls of Congress later this spring, looking to defeat any moves for an N.F.L. bill.

APPENDIX E

Statement of Parties in Interest Pursuant to Rule 28.1

The parties to the proceedings below (including the names of the respondents) as of the time of trial are set forth in the footnote at page ii of the petition. In compliance with Rule 28.1 of the Rules of the Supreme Court, set forth in the margin below are the names of the parent or affiliated corporations of the 6 of said respondents which are (or were) controlled by corporations.* The remaining respondents are (or were) either controlled by individuals or, in the case of the North American Soccer League ("NASL"), is an unincorporated association.

Since the time of trial, the following additional corporations have, through NASL team ownership transfers, acquired control of NASL clubs: La Brasserie Molson du Quebec Limitee (Montreal Manic); and York-Hannover Ltd. (Toronto Blizzard).

---

* The corporations having control of NASL teams at the time of the trial were: Bayly Corporation (Houston Hurricane); Thomas J. Lipton, Inc. (New England Tea Men); Warner Communications, Inc. (New York Cosmos); Louisiana Pacific Corporation (Portland Timbers); Global Communications, Ltd. (Toronto Blizzard); and Gulf & Western Industries, Inc., through its subsidiary, Madison Square Garden Corporation (Washington Diplomats). Since trial, the Houston and Washington teams have ceased operations.

No. 81-2296

FIL
1982

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL FOOTBALL LEAGUE, *et al.*,

Petitioners,

—against—

NORTH AMERICAN SOCCER LEAGUE, *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF

WILLIAM E. WILLIS
Attorney for Petitioners
125 Broad Street
New York, New York 10004
(212) 558-4000

JAMES H. CARTER
HOWARD D. BURNETT
JAMES W. DABNEY
SULLIVAN & CROMWELL
Of Counsel

TABLE OF CONTENTS

	PAGE
Table of Authorities	i
I. The Court of Appeals' Confusion Over What Is "Anticompetitive" Is Likely to Cause Precedential Mischief	2
II. This Court's Decision in *Arizona* v. *Maricopa County Medical Society* Recognizes the Propriety of a "Single Firm" Antitrust Analysis for Joint Ventures Such as the NFL	3
III. Application of Appropriate Antitrust Standards to Intra-Sports League Business Decision Making Is Not Equivalent to Sherman Act "Immunity"	8
IV. There Are No Pending Legislative Matters Related to This Petition	10
Conclusion	10

TABLE OF AUTHORITIES

Cases

Arizona v. *Maricopa County Medical Society*, 50 U.S.L.W. 4687 (U.S. June 18, 1982) (No. 80-419)	3, 4, 5
Broadcast Music, Inc. v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979)	4, 5
Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962)	3
Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)	3

PAGE

Gunter Harz Sports, Inc. v. *United States Tennis Association, Inc.*, 511 F. Supp. 1103 (D. Neb.), *aff'd*, 665 F.2d 222 (8th Cir. 1981) 8

Levin v. *National Basketball Association*, 385 F. Supp. 149 (S.D.N.Y. 1974) 5

Los Angeles Memorial Coliseum Commission v. *National Football League*, 519 F. Supp. 815 (C.D. Cal. 1981) 5

National Society of Professional Engineers v. *United States*, 435 U.S. 679 (1978) 8

Neeld v. *National Hockey League*, 594 F.2d 1297 (9th Cir. 1979) 8

San Francisco Seals Ltd. v. *National Hockey League*, 379 F. Supp. 966 (C.D. Cal. 1974) 5

Smith v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978) 5, 8

WTWV, Inc. v. *National Football League*, 678 F.2d 142 (11th Cir. 1982) 5

Statutes

15 U.S.C. § 18 9

15 U.S.C. § 19 9

IN THE

Supreme Court of the United States

October Term, 1981

No. 81-2296

NATIONAL FOOTBALL LEAGUE, *et al.*,

Petitioners,

—against—

NORTH AMERICAN SOCCER LEAGUE, *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF

The National Football League and those of its component teams named as parties to this action (collectively, the "NFL") submit this Reply Brief in accordance with this Court's Rules 22.5 and 22.6.

Respondents in this action are the North American Soccer League and certain of its component teams (collectively, the "NASL"), a number of which are or until recently were owned by such giant American and Canadian corporations as Thomas J. Lipton, Inc., Warner Communications, Inc., Gulf & Western Industries, Inc. (Madison Square Garden), Molson Breweries, Louisiana Pacific Corporation, Bayly Corporation and Global Communications, Ltd.[1] These enormous enterprises claim that their soccer venture is unable to compete "successfully" against the rival NFL unless the football league permits the con-

[1] Brief for Respondents in Opposition (hereinafter "Opp.") at 16a. The NFL, in contrast, permits controlling ownership only by individuals or organizations not principally engaged in a business other than NFL football.

tinuation of interlocking management groups and cross-ownership between itself and its competitors.

The NFL submits this Reply Brief in order to reply to certain arguments first raised by the NASL in its Brief in Opposition and to note the significance of a decision which this Court handed down after the NFL's Petition was filed.

I.

The Court of Appeals' Confusion Over What Is "Anticompetitive" Is Likely to Cause Precedential Mischief.

The NFL and the NASL both are joint ventures composed of separate economic entities. The same can be said of any joint venture. But once legitimate ventures such as professional sports leagues are formed, they compete as distinct economic enterprises with each other and with all other forms of paid entertainment. The preservation of competition among these enterprises depends in large part upon ensuring that the competing leagues maintain a healthy distance from one another. The decision below, however, stands for a contrary proposition.

The Court of Appeals, together with the NASL, labelled the NFL's desire to compete as a league against similar sports leagues—including the NASL, with its rich corporate support—as "anticompetitive." The NASL points to this statement [2] as a principal support for its argument that the decision below is not a deviation from governing antitrust authority.

But the trial court, which first used this word, put it in a very different context:

---

[2] Opp. at 6.

> "The distinction lies between competition and competitors. . . . Economic conduct may damage competitors. Indeed, it may be specifically designed to do so. There is nothing illegal in that. Competitors compete.
>
> * * *
>
> "The anticompetitive intent of the cross-ownership ban is *not an illegal intent*, because the NFL, which competes against other professional sports leagues as a single economic entity, seeks to promulgate the ban in furtherance of that entity's marketplace efficiency. The ban is an exercise in entity housekeeping. . . ." [3]

The proper distinction, as this Court has held,[4] is between the legitimate *anticompetitor* intent with which all economic "persons" are encouraged to enter the marketplace and the anticompetitive intentions with which separate economic actors join forces unlawfully to impede the normal processes of competition. The Court of Appeals confused these two ideas and thus arrived at a perverse result.

II.

This Court's Decision in *Arizona* v. *Maricopa County Medical Society* Recognizes the Propriety of a "Single Firm" Antitrust Analysis for Joint Ventures Such as the NFL.

In *Arizona* v. *Maricopa County Medical Society*,[5] this Court dealt with alleged price fixing activities of certain

---

[3] 505 F. Supp. at 677-78, 689 (NFL Appendix B at 69a, 96a) (emphasis added).

[4] *See, e.g., Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)).

[5] 50 U.S.L.W. 4687 (U.S. June 18, 1982) (No. 80-419).

foundations for medical care involving individual physicians "who compete with one another for patients." [6] These phyicians had not combined in order to sell any product or service different from those which the physicians offered severally. The Court contrasted the physicians' relationship in these foundations with that among members of organizations such as the American Society of Composers, Authors and Publishers ("ASCAP")[7] and, by implication, professional sports leagues:

> "The foundations are *not* analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit. *In such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market.*" [8]

As *Maricopa* thus reaffirmed, § 1 of the Sherman Act calls for economic analysis of conduct—not formalistic evaluation of the structure—of multiple-member entities operating as partnerships or joint ventures. The relevant questions include:

—Are the sub-units separate "persons who would otherwise be competitors" of one another in producing and selling the product involved? [9]

—Do these component units operate with pooled assets and share "risks of loss" and opportunities for profit"? [10]

---

[6] *Id.* at 4693.

[7] *See Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

[8] 50 U.S.L.W. at 4693 (emphasis added).

[9] *Id.*

[10] *Id.*

—Does the resulting entity act as a separate seller of a product (such as a "blanket license" to use copyrighted musical compositions) which is distinct from the products offered or which could be offered by the sub-units individually? [11]

As the District Court in this action[12] and other courts[13] have held, individual member clubs of a professional sports league for most purposes are not economic competitors of one another. The Court of Appeals' rejection of these precedents and its endorsement of a conflicting line of authority[14] has created divergence among the federal courts and contributed materially to the doctrinal confusion noted in the NFL's Petition.

The NFL clubs operate as separate "profit centers" within a single economic enterprise (as do, for example, regional offices of national accounting firms and law firms whose members practice as partners but may receive shares of the firm's profits computed on differing bases and subject to varying local costs). Differing club stadium arrangements and payrolls may result in non-uniform profit levels, but there can be no doubt that the teams' economic fate, like that of the members of any professional sports league, is virtually totally interdependent.[15] The teams jointly and

---

[11] *Id.* & n.31 (quoting *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 22 (1979)).

[12] 505 F. Supp. at 691 (NFL Appendix B at 101a).

[13] *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173, 1178-79 (D.C. Cir. 1978); *San Francisco Seals, Ltd.* v. *National Hockey League*, 379 F. Supp. 966, 969-70 (C.D. Cal. 1974); *Levin* v. *National Basketball Association*, 385 F. Supp. 149, 150 (S.D.N.Y. 1974).

[14] *See, e.g., Los Angeles Memorial Coliseum Commission* v. *National Football League*, 519 F. Supp. 815 (C.D. Cal. 1981).

[15] *WTWV, Inc.* v. *National Football League*, 678 F.2d 142 (11th Cir. 1982).

collectively, as a league, own what are perhaps the NFL's most valuable assets, namely, its good will, reputation and fan allegiance; and their principal business decisions are made through a central governing body. The NFL also shares equally among the member teams its most important revenue sources: network television receipts are divided equally among the members, pre-season gate receipts from each game are shared on a 50/50 basis between opposing teams, and regular season gate receipts are divided on the basis of 60% for the home team and 40% for the visiting team.[16] The clubs also function with common filming, licensing and promotional operations.

The *league* produces the "product," which is uniquely high quality football presented in the format of a closely-balanced seasonal race. Television networks negotiate for, purchase and publicize the *league's* product,[17] and the *league's* Management Council bargains collectively with a single players' union. The profits of all clubs depend directly on the outcome of such negotiations with networks and players.

While the precise dollar amount of particular clubs' profits or losses may vary, the member teams (in the language of *Maricopa*) clearly "share risks of loss" and

---

[16] 670 F.2d at 1251-52 (NFL Appendix A at 5a).

[17] The trial court in this action found that:

> "The networks . . . evaluate the strength of the sports league's generic product as a competitor in the market for television viewers and advertisers, adjust the terms offered to the leagues accordingly, and compile their individual rating and market share statistics on the basis of the *league* sports, *not* the *individual teams*. 505 F. Supp. at 679 (NFL Appendix B at 73a) (emphasis added).

"opportunities for profit." [18] The individual NFL clubs are not capable of acting separately as business competitors to sell "additional" NFL football games "on the side." Their situation therefore is even more closely related to the single firm economic model than was that of the individual artists who made up ASCAP.

The Court of Appeals disregarded the need for an examination of the economic basis of a professional sports league and instead treated the NFL's attempt to formulate legitimate conflict of interest rules as if the NFL were a mere industry "trade association," formed for the convenience of its 28 members, which excluded 26 NASL-affiliated competitors in the "industry." It ignored the existence and operation of a legitimate joint business with the right to compete as such and to command the exclusive loyalties of its members through rules ancillary to joint venture operations.

As a consequence, the Court of Appeals reached an astonishing conclusion: a professional sports league, in making production and marketing decisions and pursuing its own legitimate business interests, may not arrive at any internal agreements which are inconsistent with the business interests of its horizontal competitors. Neither the Rule of Reason nor any other antitrust principle countenances such a result.

---

[18] The Court of Appeals ignored the NFL's overwhelmingly shared set of risks and opportunities and relied instead upon the mere existence of a few separate and incidental club revenue sources, such as local television (for pre-season games only) and radio income. 670 F.2d at 1252 (NFL Appendix A at 5a). These separate revenue sources amount to only 5 to 10 percent of total revenues. Compare the Trial Court's discussion at 505 F. Supp. 679-80 (NFL Appendix B at 74a).

III.

Application of Appropriate Antitrust Standards to Intra-Sports League Business Decision Making Is Not Equivalent to Sherman Act "Immunity."

The NASL's Brief in Opposition suggests repeatedly[19] that to adopt a Rule of Reason standard which would take into account the unique circumstances of enterprises such as professional sports leagues would be to grant antitrust "immunity" to such enterprises. This is incorrect.

The NFL submits that antitrust review of the business conduct of professional sports leagues ordinarily should begin with the "single firm" analysis suggested by *Maricopa*. But application of this doctrine is not the only manner in which this Court might resolve the conflicting and ill-reasoned sports law decisions which now abound. Even if NFL clubs were not a single enterprise, a Rule of Reason test could be formulated which would direct courts to weigh the conduct of professional sports leagues in light of whether that conduct is ancillary to legitimate *league* business goals. In any event, the issue is not "immunity."

In *National Society of Professional Engineers* v. *United States*,[20] this Court tested a restriction imposed by a trade association of competitors to see "whether the challenged agreement is one that promotes competition or one that suppresses competition."[21] In sports league cases, the federal courts have searched in vain for a way to apply this test in a rational fashion.[22] Since the member clubs of a

---

[19] *See, e.g.*, Opp. at 3, 24, 27, 28.

[20] 435 U.S. 679 (1978).

[21] *Id.* at 691.

[22] *See, e.g., Neeld* v. *National Hockey League*, 594 F.2d 1297 (9th Cir. 1979); *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978). *Cf. Gunter Harz Sports, Inc.* v. *United States Tennis Association, Inc.*, 511 F. Supp. 1103 (D. Neb.), *aff'd*, 665 F.2d 222 (8th Cir. 1981).

professional sports league normally are not separate competitors, many legitimate league pursuits yield effects which cannot logically be classified as either "pro-competitive" or "anti-competitive" in relation to any competition among the clubs. In the present case, a conflict of interest rule which would forbid interlocking ownership with a rival league is not designed to, and presents no prospect of, promoting competition among NFL clubs; yet strengthening the loyalty and commitment of NFL club owners to their joint enterprise necessarily will tend to improve the NFL's competitive market capabilities in relation to competing forms of entertainment. The Second Circuit took the *Professional Engineers* test entirely out of its logical context and inappropriately applied it to determine whether the NFL's rule promoted the economic well-being of a horizontal competitor league. This turns the Sherman Act on its head.

Properly viewed, the NFL's conflict of interest rules promote competition in the same way as does any other internal policy of a business organization which separates that entity and its sub-units from competitors in order to assure that decisions will be made independently. *Cf.* 15 U.S.C. §§ 18, 19. The Court of Appeals, like the courts involved in certain other sports league cases, simply ignored this basic consideration.

The term "immunity" is a red herring. Under a "single firm" analysis, sports leagues remain as much subject to the antitrust laws as do other single firms. And under a proper Rule of Reason standard, the NFL by-law provisions in issue here would be not only unobjectionable, but commendable.

IV.

There Are No Pending Legislative Matters Related to This Petition.

In spite of the gossip and misinformation contained in the various newspaper clippings appended to the NASL's Brief in Opposition, there is not now and never has been any pending legislation which would govern the issues presented by the NFL's Petition.

CONCLUSION

For the reasons set forth in the NFL's Petition and this Reply, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

WILLIAM E. WILLIS
Attorney for Petitioners
125 Broad Street
New York, New York 10004
(212) 558-4000

JAMES H. CARTER
HOWARD D. BURNETT
JAMES W. DABNEY
SULLIVAN & CROMWELL
Of Counsel

July 29, 1982